IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,

Plaintiff,

VS.

DENNY'S RESTAURANTS, INC.,

Defendant.

CASE NO. 91-C-715-C

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Ronald K. Thomas ("Plaintiff"), and Defendant, Denny's, Inc. ("Defendant"), jointly stipulate that all claims herein should be dismissed with prejudice with each party to bear its own costs and attorneys' fees.

DATED this 7th day of December, 1998.

Respectfully submitted,

SNEED LANG, P.C.

Brian S. Gaskill

James C. Lang
G. Steven Stidham
Brian S. Gaskill
2300 Williams Center Tower
Two West Second Street
Tulsa, Oklahoma 74103-3136

-and-

D. Gregory Bledsoe
1717 South Cheyenne Avenue
Tulsa, Oklahoma 74119-4664

ATTORNEYS FOR PLAINTIFF
RONALD K. THOMAS

mail old envt

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WICKLIFF & HALL, P.C.

Judith A. Colbert
1000 Louisiana, Suite 5400
Houston, Texas 77002-5013
Telephone: 713/750-3100
Telecopier: 713/750-3101

- and -

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
Frank M. Hagedorn, OBA #3693
320 South Boston Avenue
Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR DEFENDANT
DENNY'S, INC.

WICKLIFF & HALL

A PROFESSIONAL CORPORATION

1000 LOUISIANA, SUITE 5400
HOUSTON, TEXAS 77002-5013

TELEPHONE
(713) 750-3100

TELECOPIER
(713) 750-3101

December 7, 1998

Re: *Ronald K. Thomas v. Denny's, Inc.*
Case No. 91-C-715-C
United States District Court for the Northern District of Oklahoma

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Clerk of the Court
United States District Court
For the Northern District of Oklahoma
United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103

Dear Clerk of the Court:

Enclosed for filing in the above captioned matter is a Joint Stipulation of Dismissal. Also enclosed is a proposed Order for use in this matter. Should the Court grant the Order, please return a file stamped copy of the Motion and Order to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance. Should you have any questions, please feel free to call me at 713/750-3154.

Very truly yours,

Judith A. Colbert

JAC/ls
Enclosures

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL SUMRALL,

Plaintiff,

v.

NELSON ELECTRIC SUPPLY COMPANY, Trade Name for SUMMERS GROUP, INC.,

Defendant.

Case No. 98-cv-0161B(J)

STIPULATION OF DISMISSAL

Come the parties, by their respective counsel, pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, and announce to the Court that all issues in controversy in the above-styled cause have been resolved in accordance with a Confidential Settlement Agreement and Release of All Claims between the parties, by the terms of which the plaintiff has agreed to a full and final settlement, compromise and accord and satisfaction of his claims and contentions in this lawsuit. Accordingly, the parties hereby stipulate that the above-styled cause may be dismissed with prejudice pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, each party to bear its own costs.

This 7th day of December, 1998.

Jgm

WILKINSON LAW FIRM

By: _____
Bill V. Wilkinson
Oklahoma Bar No. 9621

BancFirst Building, Fourth Floor
Tulsa, OK 74145-7857
(918) 663-2252

Counsel for Plaintiff

BAKER, DONELSON, BEARMAN &
CALDWELL

By: _____
John C. Harrison

1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450-1800
(423) 756-2010

Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN L. MOSLEY,

Plaintiff,

vs.

TWYLA SNIDER, Warden, Cimarron Correctional Facility, Cushing, OK; et al.,

Defendants.

No. 98-CV-884-B(J)

ORDER OF DISMISSAL

Plaintiff, a prisoner appearing pro se, has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 (#1) and a motion to proceed in forma pauperis and supporting affidavit (#2) as required by 28 U.S.C. §1915(a).

For the reasons set forth below, the Court finds that venue is not proper in this judicial district, and that, therefore, this action should be dismissed without prejudice. See Costlow v. Weeks, 790 F.2d 1486 (9th Cir. 1986) (court has the authority to raise venue issue sua sponte).

The applicable venue statute for this action provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. §1391(b). There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

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Plaintiff, an inmate at Cimarron Correctional Facility, located in Payne County, Oklahoma, identifies several defendants, all of whom are associated with the Correctional Facility in Payne County, Oklahoma. Further, the events giving rise to Plaintiff's claims arose in Payne County, Oklahoma. Payne County is located within the territorial jurisdiction of the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 116(c). Thus, it is clear that venue is not proper in this judicial district and this case should be dismissed without prejudice. 28 U.S.C. § 1406(a).

Plaintiff may pursue his claims in the United States District Court for the Western District of Oklahoma as long as he files his complaint within the applicable statute of limitations. Because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). In such cases the cause of action accrues at the time the complained of injury occurred. Id. Thus, a plaintiff must bring an action within two years of the date of that occurrence.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed without prejudice** for improper venue.

SO ORDERED this 4th day of Dec, 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS C. HAMPTON, JR.,
SSN: 447-40-1739

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 96-C-993-B(J)

ORDER

A Report and Recommendation of the Magistrate was filed October 20, 1998. No objections have been filed by the parties. The Court adopts the Magistrate's Report and Recommendation. For the reasons discussed in the Magistrate Judge's opinion, the Court **AFFIRMS** the Commissioner's decision.

Dated this 4th day of December 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHERYN S. DUKE,

Plaintiff,

vs.

PARADIGM FINANCIAL GROUP, ACCOUNT MANAGEMENT INFORMATION, INC., CREDIT BUREAU OF OKLAHOMA CITY, INC., CSC CREDIT SERVICES, EQUIFAX CREDIT INFO and TRANS UNION,

Defendants.

No. 98-C-459-B(E)

ORDER

Before the Court is the Motion For Summary Judgment filed by defendant CSC Credit Services, Incorporated (Docket #10) and the Court, being fully advised, finds as follows:

Plaintiff filed this action against the various named defendants, alleging violations of 15 U.S.C. §1681et seq. and 15 U.S.C. §1962 et seq., seeking damages for dissemination of inaccurate credit information which caused her to be denied credit. Defendant CSC Credit Services, Incorporated ("CSC") is one of the credit bureaus which

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obtained credit information, in this case from Paradigm Financial Group ("Paradigm"), which resulted in CSC providing an inaccurate credit report.

CSC moves for summary judgment pursuant to Fed. R. Civ. P. 56 and N.D. LR 56.1 on Plaintiff's claim under 15 U.S.C.§1681e(b) based upon Plaintiff's failure to notify CSC that any of the information in the report was inaccurate. CSC moves for summary judgment under 15 U.S.C. §1581(a)4 because the debt listed did not antedate the credit report by more than seven years according to the information readily available on the face of the report.

Standard of Review

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Statement of Undisputed Material Facts[1]

The following facts are undisputed:

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[1]The Court concludes these facts remain undisputed despite Plaintiff's statements to the contrary where Plaintiff failed to produce admissible evidence refuting same.

1. CSC employs the following four-part system which assures maximum possible accuracy of the credit information about its consumers contained in the consumer credit reporting database:

a. First, creditors with whom consumers have established credit histories report that history to CSC or CSC's data processor on specially formatted and coded tapes. These tapes contain account and consumer information. Most creditors send tapes to CSC or CSC's data processor at least once every thirty days. Additionally, CSC has vendors who gather public record information and then report that information to CSC or its data processor on these specially formatted and coded tapes.

b. Second, the information provided by the creditors and public records vendors is matched with the information already contained in the consumer credit reporting database. The specially formatted computer tape goes through a process by which the information on the tape is downloaded onto the database by CSC's data processor, thereby updating or adding to the files already in the database, or creating new files where necessary. CSC's data processor uses state of the art equipment and technology to accomplish this matching process.

c. Third, the consumer is given the opportunity to have input regarding credit information contained on his/her credit report by contacting CSC and disputing the accuracy of the information listed on his/her credit report in accordance with 15 U.S.C. §1681(a). When CSC receives a dispute, it reinvestigates using all the information supplied to it by both the consumer and the creditor. If the information is verified to

belong to the consumer, the information is updated on the consumer's credit report. If the information is inaccurate or can no longer be verified, the information is deleted from the consumer's credit report. If the information is verified to be accurate, the consumer is provided the opportunity to have a statement regarding the information inserted into the credit report in accordance with 15 U.S.C. §1681i(b).

d. Fourth, CSC accepts manual written requests from creditors called "Universal Data Forms." Like the specially formatted tapes, the information on these manually written requests must be properly "coded" by the creditor in order to have accurate changes made on the consumer's credit report.

2. CSC's contract with furnishers of information ("creditors") requires each furnisher of information to provide accurate information to CSC.

3. In December 1996, Paradigm caused the collection of a $2,416 debt to be listed in Plaintiff's file with CSC.

4. CSC's records indicated that the date of last activity for the collection of the item was March of 1993.

5. Plaintiff requested and obtained a copy of her credit report from CSC sometime after June 30, 1997.

6. Based upon information from Paradigm, CSC suppressed the collection item from Plaintiff's credit report by March, 1998, so that any credit reports obtained thereafter would not contain the collection item unless the creditor supplied more data confirming the entry.

7. On April 4, 1998, two used automobile dealers obtained Plaintiff's credit report. Neither report contained the collection item.

Procedural Defense

Plaintiff urges this Court should deny summary judgment because discovery has not yet been conducted as contemplated by Fed. R. Civ. P. 56. See *Celetex, supra.* The Complaint was filed June 30, 1998 and Answer was filed July 24, 1998. The case is set for case management conference December 14, 1998. Accordingly, no scheduling order has been entered. Neither party referenced what, if any, discovery has been conducted to date. CSC counters that Plaintiff ineffectively raises this issue by failing to provide an affidavit as required by Fed. R. Civ. P. 56 (f) explaining how postponing ruling on the motion to allow discovery would produce any evidence relevant to the issues raised by the summary judgment motion.

The Tenth Circuit has resolved this issue in *Committee for First Amendment v. Campbell, supra.* The Court held that the unverified assertion of counsel in opposition to summary judgment does not comply with the requirement that nonmovant seeking to defer summary judgment ruling pending discovery provide an affidavit explaining why facts precluding summary judgment cannot be presented. Evidence or facts must be presented by affidavit to grant continuance. This Plaintiff has wholly failed to provide. Accordingly, summary judgment may not be deferred on that basis.

Disputed Fact[2]

As substantive response, Plaintiff urges summary judgment is inappropriate based upon a dispute of material fact. Plaintiff disputes CSC's proffered fact #8 which states:

"Plaintiff did not dispute any of the information on her credit report prior to filing of this lawsuit on June 30, 1998."

To refute this, Plaintiff provides an affidavit stating:

"I filed a written report with CSC Credit asking for a copy of the credit report and indicating that certain information on the report was false ....The Credit Bureau misspelled my first name and had listed an unpaid debt of 'Paradigm,' a company I had never heard of. I requested that information be deleted."[3]

In its opening brief, CSC took the position that it was entitled to summary judgment because it was never notified by Plaintiff that any of the information in the credit report was inaccurate. In reply to Plaintiff's affidavit indicating otherwise, CSC takes the facially inconsistent position that this "fact" is not material to the resolution of Plaintiff's claim under §1681e(b), offering no explanation for its change of position or its submission of an inaccurate "fact," knowledge of which would seem to be in its possession. CSC states that even if Plaintiff reported the error to CSC, that is germane only to CSC's duty to reinvestigate under §1681(i) and not to the "maximum possible

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[2]Plaintiff's response brief states she does not dispute facts #1, #3, #6 and #7. Her brief however then proceeds to attempt to dispute facts found within the alphabetically listed subparts of #1. Because no evidence admissible in a court proceeding is presented in support of the alleged disputed facts, those facts are deemed admitted. Plaintiff urges that Defendant does not specifically say the four-point system CSC offers in support of summary judgment was used in this particular instance. Plaintiff concedes the fact that CSC states it uses this system inferentially indicates it was used in the preparation of Plaintiff's credit report.

[3]Plaintiff's affidavit does not provide a date or time frame during which the notice was given nor does Plaintiff provide a copy of the notice. The Court therefore is unable to ascertain exactly what defect CSC was placed on notice to cure or investigate.

accuracy" provisions of §1681e(b).[4]

The Court must therefore determine whether notification by Plaintiff precludes summary judgment as to a claim brought under §1681e(b), which provides:

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

In reviewing a claim brought under this provision, the Court looks to what a reasonably prudent person would do under the circumstances. No strict liability is imposed by this section. *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509 (5th Cir. 1982)

CSC correctly states that Plaintiff is attempting to impermissibly impose the verification requirements of §1681(i) onto her claims brought under §1681e(b). Section 1681(i) provides the procedure to be followed, after notification, for dispute resolution and reinvestigation. Although no appellate courts have squarely addressed this issue, two district court cases cited by CSC conclude the provisions of §1681e(b) are separate from the verification provisions of §1681(i), a result in which this Court concurs. *Jones v. Credit Bureau of Garden City, Inc.*, 703 F. Supp. 897 (D.Kan.1988), *Swoager v. Credit Bureau of Greater St. Petersburg,* 608 F. Supp. 972 (D.C. Fla. 1985). To require credit agencies to independently verify every entry sent them would conceivably cripple

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[4]In her response, Plaintiff urges summary judgment should not be granted as there is no evidence presented as to the standards CSC used in allowing Paradigm to become a member. Again, this is merely an unsupported allegation which is insufficient to defeat summary judgment. It is Plaintiff's burden to establish that CSC's procedures were not reasonable, whether those procedures relate to accepting members or data from those members.

the industry.

Plaintiff's affidavit raising a disputed fact as to notice may allow Plaintiff to go forward against CSC under §1681(i) but does not relieve Plaintiff of the obligation to come forward with some evidence at this time to support her proposition that CSC's procedures in obtaining credit information on Plaintiff fell outside the standard of reasonableness set forth in §1681e(b).

The facts material to the resolution of this issue are those listed above as numbers 1.a. and 1.b. Plaintiff has wholly failed to provide competent evidence to establish that the procedures used by CSC and set forth as numbers 1.a. and 1.b. were unreasonable. On this basis, CSC would appear to be entitled to summary judgment. However, in addition to the fact CSC's affidavit does not specifically state the listed procedures were used in Plaintiff's case, the affidavit also fails to specify a time frame within which these procedures were in place. The omission of both these facts precludes the Court finding CSC has established the essential elements of its claim under §1681e(b) to entitle CSC to entry of summary judgment.

Plaintiff's §1681c(a)4 Claim

CSC also states it is entitled to summary judgment on Plaintiff's §1681c(a)4 claim because Plaintiff failed to address this claim in her response brief. Plaintiff did, however, attempt to address this issue in her response brief. The Court therefore considers the claim on the merits.

Section 1681c(a)4 provides:

> [N]o consumer reporting agency may make any consumer report containing. . .[a]ccounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

CSC submits as its undisputed material fact in support of summary judgment on the merits fact listed as number 4, which states: "CSC's records indicated that the date of last activity for the collection of the item was March of 1993."

Plaintiff's response to this asserted fact is: "Plaintiff requested information both in writing and verbally sometime immediately after June, 1997, disputing any debt from Paradigm and correcting the spelling of her name."

This is not responsive to the issue. It does not establish that Plaintiff advised CSC that the debt was more than seven years old. Further, the date of June, 1997, is supplied by counsel and is not supported by the affidavit alleged to refute CSC's proffered fact.[5] Under the standard set forth in *Spence v. TRW, Inc.*, 92 F.3d 380 (6th Cir. 1996), Plaintiff's failure to advise CSC of the staleness of this claim entitles CSC to summary judgment on Plaintiff's §1681c(a)4 claim.

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[5]Even if the date had been supported by the affiant, this does not refute the proposition urged.

IT IS THEREFORE ORDERED that Defendant CSC Credit Services, Incorporated's Motion for Summary Judgment is denied as to the claims brought pursuant to §1681e(b) and granted as to the claims brought pursuant to §1681c(a)4.

DONE THIS 7th DAY OF DECEMBER, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

DEC - 7 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHAMPION GLOVE MANUFACTURING CO., INC., an Oklahoma corporation,

Plaintiff,

v.

DAYTON HUDSON CORPORATION d/b/a Target Stores, a Minnesota corporation,

Defendant.

Case No. 98-CV-0220-K (M)

STIPULATION AND ORDER OF DISMISSAL

ENTERED ON DOCKET
DATE 12/9/98

Plaintiff Champion Glove Manufacturing Co., Inc. and defendant/counterclaimaint Dayton Hudson Corporation d/b/a Target Stores, acting by and through their attorneys, in accordance with the provisions of Rule 41 of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal, with prejudice and on the merits, of the above-captioned lawsuit, including all claims and counterclaims. Each party shall bear its own costs.

Dated: 20 Nov 98

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: _____
James P. McCann
320 S. Boston, Suite 500
Tulsa, OK 74103
(918) 582-1211
Attorneys for Plaintiff
Champion Glove Manufacturing Co., Inc.

Dated: 23 November 1998

FAEGRE & BENSON LLP

By: _____
John B. Gordon
Michael A. Ponto
2200 Norwest Center, 90 S. Seventh St.
Minneapolis, MN 55402
(612) 336-3000
Attorneys for Defendant-Counterclaimant
Dayton-Hudson Corporation
d/b/a Target Stores

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IT IS SO ORDERED

Date: 12/8/98, 1998

Terry Kern, Judge
United States District Court for the
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

RUSSELL ALLSHOUSE, Plaintiff, v. **MASTER KRAFT TOOLING CORPORATION,** Defendant.	Case No. 98-CV-491 H(E)

JOINT STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED by and between the parties, by and through their undersigned attorneys, that the above-entitled action shall be dismissed with prejudice and on the merits but without costs or attorney fees to either party, and that judgment of dismissal with prejudice and on the merits may be entered hereon pursuant hereto without further notice.

Dated: December 2, 1998

By: _____
Jeff Nix, OBA# 6688
601 South Boulder, Suite 610
Tulsa, Oklahoma 74119
Attorney for Plaintiff

By: _____
Bill V. Wilkinson, OBA# 9621
Lawrence W. Zeringue, OBA# 9996
Wilkinson Law Firm
7625 East 51st Street, Suite 400
Tulsa, Oklahoma 74145-7857
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL NISSEN, an individual,

Plaintiff,

vs.

THE SHERWIN-WILLIAMS COMPANY, a foreign corporation,

Defendant and Third-Party Plaintiff,

vs.

SAF-T-GLOVE, INC., an Oklahoma corporation, and KAPPLER SAFETY GROUP, INC., an Alabama corporation,

Third-Party Defendants.

Case No. 97CV1135H (M)

STIPULATION OF DISMISSAL

COME NOW the parties and hereby stipulate and agree that the Plaintiff Paul Nissen's claims against Defendant, The Sherwin Williams Company, are dismissed with prejudice, and that the Third-Party Plaintiff Sherwin Williams' claims against the Third-Party Defendants, Saf-T-Glove, Inc., and Kappler Safety Group, Inc., are dismissed with prejudice.

DATED ~~November~~ December 4, 1998.

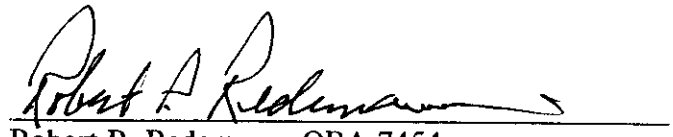
Respectfully submitted,

RIGGS, ABNEY, NEAL TURPEN,
ORBISON & LEWIS

By: Stephen B. Riley

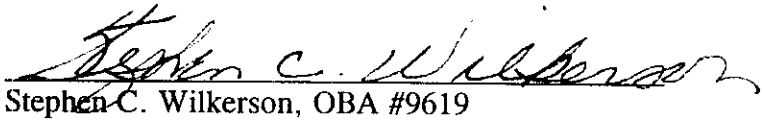
Stephen B. Riley, OBA #7589
502 West 6th Street
Tulsa, OK 74119-1010
918-587-3161
ATTORNEYS FOR PLAINTIFF PAUL NISSEN

RHODES, HIERONYMUS, JONES TUCKER & GABLE

By: 

Robert P. Redemann, OBA 7454
P. O. Box 21100
Tulsa, OK 74121-1100
918-582-1173
ATTORNEYS FOR DEFENDANT AND
THIRD-PARTY PLAINTIFF, THE
SHERWIN WILLIAMS COMPANY

KNIGHT, WILKERSON, PARRISH,
WASSAL & WARMAN

By: 

Stephen C. Wilkerson, OBA #9619
P.O. Box 1560
Tulsa, OK 74101-1560
918-584-6457
ATTORNEYS FOR THIRD-PARTY DEFENDANT
KAPPLER SAFETY GROUP, INC.

RICHARDS & ASSOCIATES

By: 

Phil R. Richards, OBA #10457
Rachel C. Mathis, OBA #16360
9 East 4th Street, Suite 910
Tulsa, OK 74103
918-585-2394
ATTORNEYS FOR THIRD-PARTY DEFENDANT
SAF-T-GLOVE, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 12/9/98

TRESSIE LOPER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 98-CV-41-K**
	)	
METROPOLITAN LIFE INSURANCE, COMPANY and AMR, INC.,	)	
	)	
Defendants.	)	

FILED
DEC 09 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter came on for pretrial conference on December 7, 1998. Defendants appeared through their counsel and plaintiff's counsel did not appear. The Court elected to dismiss the action without prejudice, but noted that it was considering granting the defendants' pending motions for summary judgment. Had plaintiff's counsel appeared at the pretrial conference, the Court intended to inquire if any evidence existed that the executed change of beneficiary form had been submitted or had attempted to be submitted to the defendants.

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It is the Order of the Court that this action is hereby DISMISSED without prejudice. However, leave of Court is required before the action may be refiled. In any such application for leave, plaintiff's counsel, subject to Rule 11 F.R.Cv.P., should state the evidence which would oppose defendants' motions for summary judgment and further state that counsel intends to vigorously prosecute this action.

ORDERED this 8 day of December, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

v.

Pamela Schoeppel,
Platinum Drilling, Inc., and
Double B-J Gas, Inc.,
Defendants.

CIVIL ACTION NO.
98CV0162M

ORDER OF DISMISSAL

The court having reviewed the Motion To Dismiss Based Upon Settlement and good cause having been shown:

IT IS THEREFORE ORDERED that the above styled case is dismissed with prejudice.

IT IS FURTHER ORDERED that each party will bear its own costs and attorneys fees.

IT IS SO ORDERED December 7th, 1998.

Frank H. McCarthy
UNITED STATES ~~DISTRICT~~ MAG JUDGE

mtdsetl.ord(21miscgen)

(13)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD D. THOMAS,
SSN: 440-74-1918

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-952-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's denial of benefits and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 7th day of December 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD D. THOMAS,
SSN: 440-74-1918

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-952-J

ORDER[2/]

Plaintiff, Richard D. Thomas, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits at Step Two.[3/] Plaintiff asserts that the Commissioner erred because (1) Plaintiff has more than a *de minimis* impairment and therefore denial at Step Two was improper, and (2) the ALJ improperly evaluated Plaintiff's credibility. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated January 31, 1997. [R. at 8-20]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on August 22, 1997. [R. at 4].

(13)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 4, 1965. [R. at 171]. Plaintiff testified that he was 5'7" and weighed 200 pounds. [R. at 171].

A PRT completed by R. Smallwood, Ph.D. on October 3, 1995, indicated that Plaintiff's impairment was "not severe."[4/] [R. at 41]. A second PRT completed by Janice c. Boon, Ph.D. on December 14, 1995 indicated that Plaintiff's impairment was "not severe."[5/] [R. at 65].

A social security interview indicated that Plaintiff claimed mental problems due to his bad nerves as a result of his four year stay in prison. [R. at 52]. The examiner noted that Plaintiff lived alone, that he visited his girlfriend, that he got along with others, that he did his own cooking, cleaning, laundry, and shopping, and that he took care of his own grooming and hygiene. [R. at 52]. The examiner additionally recorded that Plaintiff watched movies on HBO and Cinemax. [R. at 52].

A Workers' Compensation Court concluded that Plaintiff was temporarily totally disabled from November 13, 1992 until December 7, 1992. [R. at 97]. Plaintiff received a four percent permanent partial disability rating due to the injury to his neck, and a six percent permanent partial disability due to the injury to his back. [R. at 97].

[4/] The form additionally indicated that Plaintiff had a slight restriction of daily living, slight difficulty in maintaining social functioning, "seldom" deficiency of concentration, persistence or pace, and no episodes of deterioration or decompensation in work or work-like settings. [R. at 48].

[5/] The form additionally indicated that Plaintiff had a slight restriction of daily living, slight difficulty in maintaining social functioning, "seldom" deficiency of concentration, persistence or pace, and no episodes of deterioration or decompensation in work or work-like settings. [R. at 72].

On November 5, 1992, Plaintiff sprained his back when he moved pop from a freezer and put it into a cooler. [R. at 102].

In a disability report completed February 27, 1995, Plaintiff reported that he experienced pain if he stood for thirty minutes or if he bended or lifted. [R. at 108]. According to Plaintiff, he was told by Kenneth R. Trinidad, D.O., not to bend, stoop, squat, or lift over ten pounds. [R. at 111]. Plaintiff noted that he played cards once each week for approximately thirty minutes. [R. at 111].

Plaintiff was examined by Terrence Murphy, M.D., on December 22, 1995. Dr. Murphy concluded that Plaintiff was temporarily totally disabled from November 5, 1992 until December 7, 1992. [R. at 121]. Dr. Murphy additionally gave various ratings to Plaintiff based upon limitations, and concluded that Plaintiff had a permanent impairment to the "whole person" due to his injuries of 44%. [R. at 122].

Plaintiff was examined on September 14, 1994, by Kenneth R. Trinidad, D.O. [R. at 124]. He noted that Plaintiff was employed as a cook on June 17, 1994, when he slipped on some grease and landed on his buttocks and left hip. [R. at 124]. Dr. Trinidad concluded Plaintiff was disabled from June 17, 1994 until July 8, 1994. The doctor noted that Plaintiff "has had a satisfactory response to treatment, however, at this time has symptoms of a chronic myofascial strain injury with tenderness and spasm in the lumbar region with restricted movement. I find no evidence of disk derangement at this time. It appears that he has achieved maximum medical recovery and on this date, I considered him for permanent impairment." [R. at 125]. He concluded that Plaintiff had a total 14 percent impairment to the whole person. [R.

at 126]. He concluded that, in his opinion, Plaintiff was stable and had achieved maximum medical recovery.

On September 18, 1994, Dr. Trinidad noted that Plaintiff stated his condition had stabilized and was working as a janitor but doing no heavy lifting. [R. at 128]. He wrote that Plaintiff had "persistent lumbosacral strain," and "at this time it appears that his condition is stable. I have released him from care and he is to be seen on an as needed basis only." [R. at 128].

Dr. Trinidad previously treated Plaintiff for a prior work-related back injury and released him to return to "medium duty" work with no lifting over 30 pounds on December 8, 1992. [R. at 135].

An independent medical evaluation dated September 19, 1995, is included in the record. [R. at 143]. The examiner indicated that he reviewed reports generated by the Workers' Compensation Court, and the law offices of Jack G. Zurawick, and that additional information was obtained from Plaintiff during a visit with the physician on September 8, 1995. He concluded that Plaintiff needed additional medical care "because of an unfavorable progression of his condition after 05 June 1995 (attributed to the injury reported to have occurred 17 June 1994)." [R. at 144]. He concluded that Plaintiff was temporarily totally disabled on September 8, 1995. [R. at 145].

A social security examiner examined Plaintiff on September 28, 1995. He noted that Plaintiff visited his girlfriend three times a week although he denied visiting people and that Plaintiff enjoyed movies and Nintendo games. The examiner noted that

Plaintiff was "oriented to person, place, time and situation but I think he was trying to make it seem like he was not." [R. at 149].

At the hearing before the ALJ on June 26, 1996, Plaintiff testified that he completed the twelfth grade and attended welding school. [R. at 172]. Plaintiff stated that he stopped working in January 1995 due to his pain. [R. at 174].

According to Plaintiff, the longest trip he has taken has been to Dallas (two years ago). Plaintiff acknowledged that he went to the grocery store and Wal-Mart but stated that he did not cook or clean. [R. at 174].

Plaintiff testified that he had pain in his back, that he had headaches every hour which sometimes lasted ten or fifteen minutes, that he experienced burning pain all of the time and was unable to work. [R. at 178]. Plaintiff stated when he was in prison he was the victim of an attempted rape and that he had experienced psychological problems since that time. [R. at 182]. Plaintiff acknowledged that he had never seen a psychiatrist. [R. at 182].

Plaintiff stated that he could walk only one-half of a block and stand for five minutes. [R. at 183]. Plaintiff takes extra strength Tylenol and no longer takes prescriptions because his doctor does not prescribe anything for him. [R. at 186]. According to Plaintiff his doctor told him to try to exercise more and to try to walk more. [R. at 187]. Plaintiff additionally testified that he hears voices and is depressed. [R. at 197].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[6/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

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[6/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[7/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

7/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff did not have a "severe" impairment as that is defined in the social security regulations at Step Two. The ALJ noted that Plaintiff was treated and released by Dr. Trinidad, and that X-rays of the lumbar spine were unremarkable. The ALJ observed that Plaintiff has never sought treatment for any alleged psychiatric problems, and that the information provided by Plaintiff to the examiner was inconsistent. The ALJ additionally examined Plaintiff's complaints of pain but concluded that Plaintiff's statements were not fully credible. The ALJ noted that Plaintiff takes only over-the-counter pain relief and has not sought treatment for his complaints. The ALJ reviewed the opinions of Plaintiff's treating physicians and observed that Plaintiff was not found disabled except for short periods of "temporary disability."

IV. REVIEW

STEP TWO EVALUATION

Step Two of the Sequential Evaluation Process is governed by the Secretary's "severity regulation." Bowen, 482 U.S. at 140-41; Williams, 844 F.2d at 750-51. The "severity regulation" provides that:

> If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, [the Secretary] will find that you do not have a severe impairment and are, therefore, not disabled. [The Secretary] will not consider your age, education, and work experience.

20 C.F.R. § 404.1520(c). Pursuant to this regulation, claimant must make a "threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities." Williams, 844 F.2d at 751. This threshold determination is to be based on medical factors alone. Vocational factors, such as age, education, and work experience, are not to be considered. Bowen, 482 U.S. at 153; Williams, 844 F.2d at 750.

The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1520(b). These abilities and aptitudes include the following:

> (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
>
> (2) Capacities for seeing, hearing, and speaking;
>
> (3) Understanding, carrying out, and remembering simple instructions;
>
> (4) Use of Judgment;
>
> (5) Responding appropriately to supervision, co-workers and usual work situations; and
>
> (6) Dealing with changes in a routine setting.

20 C.F.R. § 404.1521(b).

Plaintiff's burden on the severity issue is *de minimis*. Williams, 844 F.2d at 751.

> If the claimant is unable to show that his impairments would have more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits. If, on the other hand, the claimant presents medical evidence and makes the *de minimis* showing of medical severity, the decision maker proceeds to step three.

Id. As the United States Supreme Court explains, the Secretary's severity regulation

> increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are **so slight** that it is unlikely they would be found to be disabled even if their age, education, and experience were taken into account.

Bowen, 482 U.S. at 153 (emphasis added). The Secretary's own regulations state that

> [g]reat care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued.

Social Security Ruling 85-28 (1985). In other words, Step Two "is an administrative convenience [used] to screen out claims that are 'totally groundless' solely from a medical standpoint." Higgs v. Bowen, 880 F.2d 860, 863 (6th Cir. 1988) (per curiam) (quoting Farris v. Secretary of HHS, 773 F.2d 85, 89 n. 1 (6th Cir. 1985)).

One workers' compensation doctor placed a 44% permanent impairment on Plaintiff and one doctor determined Plaintiff had a 14% permanent impairment. Dr.

Trinidad, although noting Plaintiff could return to work and releasing Plaintiff from treatment, concluded Plaintiff should not lift over 30 pounds. Dr. Hinkle conducted an "IME" and concluded Plaintiff was temporarily totally disabled as of September 8, 1995, due to his low back injury. [R. at 145]. The ALJ correctly pointed out that he was not bound by the findings of the Workers' Compensation Court, and that the standards governing workers' compensation claims are different. However, the evidence in the record indicates that Plaintiff has more than a *de minimis* injury. In addition, in his assessment of Plaintiff's credibility, the ALJ wrote that "[i]t is the conclusion of the Administrative Law judge that the pain and/or other symptoms experienced by the claimant is limiting but, when compared with the total evidence, not severe enough to preclude all types of work." [R. at 15, emphasis added]. This portion of the ALJ's opinion seems contradictory to the ALJ's Step Two conclusion that Plaintiff had no severe impairment.

The record in support of Plaintiff's asserted impairments is sparse. Plaintiff has neither visited nor been treated by many doctors. Plaintiff's complaints at the hearing do not appear supported by the record. The doctor who evaluated Plaintiff's mental condition suggested Plaintiff was exaggerating. Plaintiff's treating physician concluded that Plaintiff was only temporarily disabled and could return to work but was limited to no lifting over 30 pounds. Plaintiff complained at the hearing of headaches, black outs, and constant pain, but Plaintiff presented no such complaints to any of his physicians. Plaintiff takes only over-the-counter medication for his pain and acknowledges that his doctor has not prescribed him any other medication.

However, the Step Two level has been interpreted as presenting a very low "severity" threshold. The Tenth Circuit Court of Appeals "*de minimis*" standard appears to have been met in this case. The Court notes that a vocational expert testified at the hearing. However, the ALJ stopped at Step Two. The Court concludes that the Step Two conclusion by the ALJ must be reversed.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this decision.

Dated this 7 day of December 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMUEL PARKER,

Defendant.

ENTERED ON DOCKET

DATE DEC 8 1998

Case No. 97-CV-88-H(J)

FILED

DEC 7 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on Plaintiff's Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on November 2, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the principal amount of $2,848.65, accrued interest in the amount of $1, 307.93 as of November 14, 1996, at the rate of 8% per annum until the file date of this judgment, filing fees in the amount of $150.00 plus interest thereafter at 4.73% until fees are paid, and costs of this action.

IT IS SO ORDERED.

This 4TH day of December, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL DURHAM, individually, and
d/b/a Windmill Hill Estates Water System,

Defendant.

Case No. 98-CV-056-H(E)

ORDER

The Court having reviewed the Plaintiff's Motion To Dismiss Based Upon Settlement, and for good cause shown, hereby orders that this case be dismissed with prejudice, each party to pay its own costs and attorney fees.

IT IS SO ORDERED.

This 7TH day of December, 1998.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ST JOHN MEDICAL CENTER, INC., and TULSA RADIOLOGY ASSOCIATES, INC.,	
Plaintiffs,	Case No. 98-CV-537B(J)
vs.	
VICKIE HAYMAN and KENNETH HAYMAN,	
Defendants,	
and	
VICKIE HAYMAN and KENNETH HAYMAN,	
Defendants and Third Party Plaintiffs,	
vs.	
PROVIDER MEDICAL PHARMACEUTICAL, INC., and JOHNSON BROKERS AND ADMINISTRATORS, INC.,	
Third Party Defendants.	

STIPULATION OF DISMISSAL
WITH PREJUDICE OF PLAINTIFFS' CLAIMS

Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, the Plaintiffs St. John Medical Center, Inc. and Tulsa Radiology Associates hereby dismiss with prejudice their claims against Vickie Hayman and Kenneth Hayman.

DOERNER, SAUNDERS, DANIEL &
ANDERSON, L.L.P.

By: Michael C. Redman

Elise Dunitz Brennan, OBA No. 10276
Michael C. Redman, OBA No. 13340
320 South Boston, Suite 500
Tulsa, OK 74103-7325
(918) 582-1211
(918) 591-5360 (Fax)

Attorneys for Plaintiffs
St. John Medical Center, Inc. and
Tulsa Radiology Associates, Inc.

Donald G. Hopkins

Donald G. Hopkins
4606 S. Garnett Road, Suite 306
Tulsa, Oklahoma 74146

Attorneys for Defendants, Vickie Hayman
And Kenneth Hayman

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CURTIS WAYNE KENDRICKS, Individually and as the Parent and Legal Guardian of CURTIS BRISKER, a Minor, and NORBELLA CARR, Individually and as the Parent and Legal Guardian of DION CARR, a Minor,	)	
Plaintiffs,	)	
v.	)	**No. 98-CV-293-K**
UNITED STATES OF AMERICA, (UNITED STATES POSTAL SERVICE, An Entity Thereof),	)	
Defendant.	)	

STIPULATION OF DISMISSAL

The plaintiffs, Curtis Wayne Kendricks, individually and as the parent and legal guardian of Curtis Brisker, a minor, and Norbella Carr, individually and as the parent and legal guardian of Dion Carr, a minor, by their attorney of record, Matthew Reinstein, and the defendant United States of America, acting on behalf of the United States Postal Service, through Phil Pinnell, Assistant United States Attorney for the Northern District of Oklahoma, having fully settled all claims asserted by the plaintiffs in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

APPROVED AS TO CONTENT AND FORM:

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463
Attorney for Defendant

MATTHEW REINSTEIN, Esq.
Lawter & Pitts, P.C.
3313 North Classen Boulevard
Oklahoma City, Oklahoma 73118
(405) 525-4131
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONYA WALKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 97CV1042BU(M)
	)	
UNITED PARCEL SERVICE, INC.,	)	
	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

On November 16, 1998, the Court considered the motion of Defendant, United Parcel Service, Inc. ("UPS") for judgment on plaintiff, Tonya Walker's ("plaintiff") claim under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et. seq ("FMLA"). A hearing was conducted on the motion in the presence of the parties and their counsel. After considering the arguments of the parties, the admissions of plaintiff, through her counsel, and the unrefuted evidence, the Court determined the following:

1. Section 2617(a) of Title 29 of the United States Code does not provide for awards of nominal damages.

2. Other than her claim for nominal damages, plaintiff's only claimed injury or damages on her FMLA claim was for 5 days lost "option pay," in the amount of $846.00.

3. The evidence presented by UPS, and admitted to by plaintiff, demonstrates that plaintiff received 5 days of option pay, in January, 1998, and that the option pay received by plaintiff was for the period January 5, 1998 to January 9, 1998. The 5 days of option pay paid to plaintiff was the total amount of option pay she claimed as her damages, and to which she claimed she was entitled. UPS informed the Court that the maximum amount of

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option pay which plaintiff could have earned in January, 1998, was 5 days option pay.

4. Except for her claims for nominal damages and 5 days option pay, plaintiff advised the Court that she had no other claim for damages under the FMLA, because the Court had previously ruled that plaintiff could not claim in this lawsuit that her September 19, 1998 resignation from UPS was a constructive discharge either under the FMLA, or under Title VII of the Civil Rights Act, as amended ("Title VII").

5. Because of the Court's previous rulings on plaintiff's constructive discharge claims, plaintiff's claim for equitable relief under the FMLA, i.e., her request for reinstatement, is moot. The December 24, 1997, termination which was the basis for plaintiff's equitable claim was rescinded in January, 1998, through the grievance procedure established in the collective bargaining agreement between UPS and the International Brotherhood of Teamsters. Plaintiff lost no pay as a result of the termination, because she continued to work pending resolution of the grievance filed to protest the termination. She continued to work until she went on disability leave, on or about January 12, 1998. While on disability leave, plaintiff's termination was mitigated to a 5 day suspension, which was imposed upon her for a period during which she was on medical leave. Plaintiff lost no pay as a result of her suspension. On September 19, 1998, plaintiff resigned her employment with UPS, and has accepted employment with Federal Express.

6. Plaintiff advised the Court that, in light of the Court's

previous rulings, i.e., not to consider whether plaintiff's September 19, 1998 resignation was a constructive discharge under Title VII and the FMLA as a claim or issue in this case No. 97-CV-1042-BU, reinstatement of plaintiff was not an appropriate remedy in this litigation. Accordingly, there is no basis for the Court to exercise its equitable powers to grant of equitable relief to plaintiff.

7. Because of the Court's previous rulings on her constructive discharge, plaintiff possesses no equitable claim for relief against UPS.

Therefore, in consideration of the prior holdings of this Court in this case, and in accordance with the reasoning of Dawson v. Leewood Nursing Home, Inc., 14 F. Supp. 2d 828 (E.D. Va. 1998), the Court finds plaintiff has suffered no injury redressible by this Court under the FMLA. There is, therefore, no issue of damages or equitable relief to try in this matter, and UPS is entitled to judgment on plaintiff's FMLA claim.

Since the Court granted summary judgment to UPS on all plaintiff's other claims in this litigation, the Court holds that judgment should be, and hereby is entered this day in favor of Defendant, United Parcel Service, Inc., with its costs

UPS shall file its bill of costs with this Court in accordance with Local Rule 54.1 within fourteen (14) days of the date of entry of this Journal Entry of Judgment.

JUDGMENT FOR DEFENDANT, WITH ITS COSTS.

IT IS SO ORDERED this 4th day of December, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:

Thomas Bright, OBA # 1131
406 South Boulder, Suite 411
Tulsa, Oklahoma 74103
Telephone: 918-582-2233
Telecopy: 918-582-6106

ATTORNEY FOR PLAINTIFF

Peter T. Van Dyke, OBA #9186
Kathy Reilly Teel, OBA # 015325

McAFEE & TAFT
A PROFESSIONAL CORPORATION
10th Floor, Two Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: 405-235-9621
Telecopy: 405-235-0439

ATTORNEYS FOR DEFENDANT

/vand/ups/walker/journal.entry

FILED

DEC 4 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA LITTLE,

Plaintiff,

vs.

WAL-MART STORES, INC., a Delaware Corporation,

Defendant.

Case No. 97-CV-693-BU(J)

ENTERED ON DOCKET

DATE DEC 07 1998

JUDGMENT

The captioned matter came before this Court for Jury trial. Present were Plaintiff, Linda Little and her attorney, M. Scott Ash, and Defendant, Wal-Mart, and its attorney, Mark Steele. The jury was impaneled and sworn. It heard the evidence, the charges of the Court and the argument of counsel and returned its verdict in favor of Plaintiff, Linda Little, for the amount of $12,000.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED the Plaintiff, Linda Little, has and recovered Judgment at and from Defendant, Wal-Mart, for the sum of $12,000.00, together with costs for this action.

DATED this 4th day of December, 1998.

The Honorable Michael Burrage
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BILLY E. BROOMHALL, JR., et al.,	)	
	)	
Defendants.	)	CIVIL ACTION NO. 96-C-352-BU

AMENDED
ADMINISTRATIVE CLOSING ORDER

This matter came before the Court for status hearing on September 25, 1996. As the parties are attempting to settle this matter and believe this matter can be resolved, the Court, upon agreement of Plaintiff, **DIRECTS** the Clerk of the Court to administratively close this matter in his records.

If the parties have not reopened this matter by February 3, 1997, the plaintiff's action shall be deemed dismissed without prejudice.

Entered this 4th day of December, 1998.

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CDM:cas

(6)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GAIL WATSON,

Plaintiff,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

Case No. 98-CV-861-BU

ORDER

On November 12, 1998, Defendant removed this action from the District Court of Tulsa County, State of Oklahoma, pursuant to 28 U.S.C. § 1446. In its Notice of Removal, Defendant asserted that the Court has subject matter jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

This matter now comes before the Court upon Plaintiff's Motion to Remand. In her motion, Plaintiff contends that her prayer for relief in her petition is for a sum not to exceed $75,000.00. Plaintiff therefore contends that this Court does not have subject matter jurisdiction over this action and the action should be remanded to the District Court of Tulsa County, State of Oklahoma.

Defendant, in response, states that based upon Plaintiff's admission and stipulation that she does not pray for an amount that would exceed $75,000.00, it does not object to the remand of this action to the District Court of Tulsa County, State of Oklahoma.

Based upon Plaintiff's motion and Defendant's response and upon review of Plaintiff's petition, the Court finds that it lacks

(6)

subject matter jurisdiction over this action and that this matter should be remanded to the District Court of Tulsa County, State of Oklahoma.

Accordingly, Plaintiff's Motion to Remand (Docket Entry #3) is **GRANTED**. This action is **REMANDED** to the District Court of Tulsa County, State of Oklahoma and the case management conference currently scheduled for December 15, 1998 at 8:30 a.m. is **STRICKEN**. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, State of Oklahoma.

ENTERED this 4th day of December, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD BASNETT,

Plaintiff,

v.

JEROME V. BALES, et al.,

Defendants.

Case No. 98-CV-410-H

ORDER

This matter comes before the Court on a motion to dismiss by each of Defendant American Arbitration Association ("AAA") (Docket # 48), and Defendants General Design, Inc., d/b/a General Design and Restoration, Inc. ("General Design"), Allen Wayne Johnson, President of General Design, and Mabel Irene Johnson, wife of Allen Wayne Johnson (Docket # 49).

Plaintiff Richard Basnett, a resident of Tulsa County, seeks declaratory and injunctive relief from alleged disability and handicap discrimination by Defendants. For the reasons set forth below, Defendants' respective motions are hereby granted.

This action arises from ongoing arbitration proceedings between Plaintiff Basnett, individually and as President of Basnett Enterprises, Inc. ("Basnett Enterprises"), and Defendant General Design, an Illinois corporation doing business in Missouri. The arbitration, which is being conducted by Defendant AAA, involves a dispute relating to architectural services provided by Defendant General Design to Plaintiff.

53

I

Plaintiff's amended complaint[1] in this action alleges generally the following: in March of 1993, Plaintiff, acting individually and as President of Basnett Enterprises, employed Defendant General Design to provide architectural services in connection with the construction of a motel in Branson, Missouri. The parties executed a "Standard Form of Agreement Between Owner and Architect," (the "Agreement"). Section 7 of the Agreement provided for arbitration with Defendant AAA with respect to any dispute arising out of the Agreement.

Upon retaining Defendant General Design, Plaintiff informed it of his learning disability and requested that all written and printed materials, including architectural drawings and specifications, be sent to him in digital form. Despite General Design's promise to comply with Plaintiff's request, General Design neglected to provide Plaintiff with materials in digital form. In 1994, a dispute arose between Plaintiff and General Design whereby General Design claimed that Plaintiff and Basnett Enterprises owed additional compensation, while Plaintiff and Basnett Enterprises claimed that General Design overcharged them and made numerous mistakes with respect to the services provided, and that such mistakes would require extensive and expensive corrections. Basnett Enterprises filed a lawsuit relating to this dispute in the Circuit Court of

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[1] Plaintiff filed his original complaint on June 9, 1998, and all Defendants filed motions to dismiss for failure to state a claim upon which relief could be granted (Docket # 10 and Docket # 14). Plaintiff then filed an amended complaint on August 24, 1998, and all Defendants filed a second motion to dismiss, asserting the same grounds for dismissal as their initial motions. The second motion to dismiss of each Defendant is presently before the Court. In light of the disposition of these motions, see discussion infra p. 5-7, Defendants' original motions (Docket # 10 and Docket # 14) are rendered moot.

Additionally, in his amended complaint, Plaintiff dropped certain Defendants from this action including Jerome V. Bales, the law firm of Wallace, Saunders, Austin, Brown & Enoch, C.N.A. Insurance Co., and J. Emmerson Finney. However, prior to Plaintiff filing his amended complaint, Defendants Jerome V. Bales, and the law firm of Wallace, Saunders, Austin, Brown & Enoch, filed a motion to dismiss Plaintiff's action against them for failure to state a claim upon which relief could be granted (Docket # 12). Then, pursuant to being dropped from Plaintiff's lawsuit, these same Defendants filed a motion to dismiss Plaintiff's action on the grounds that Plaintiff no longer asserted claims against them (Docket # 32). Accordingly, the Court hereby grants these Defendants' second motion to dismiss (Docket # 32), which renders moot their initial motion (Docket # 12).

Taney County, Missouri, and Defendant General Design moved to have the Court compel arbitration according to the Agreement between the parties. On November, 21, 1996, the Court ordered the parties to arbitration, according to the terms of the Agreement, and stayed the action pending arbitration. Legal counsel represented Plaintiff at the time.

Pursuant to the Agreement, Defendant AAA was retained to provide arbitration services for the dispute between Plaintiff and Defendant General Design. In November of 1997, as a result of Plaintiff's counsel withdrawing from representing Plaintiff and Basnett Enterprises in the arbitration proceedings, Defendant AAA directed Plaintiff to represent the interests of Basnett Enterprises in the arbitration proceedings. Plaintiff then informed Defendant AAA of his disability and requested that all written and printed materials be provided to him in digital form. Plaintiff asserted that such modification or accommodation was necessary if he was to participate effectively and fairly in the arbitration proceeding.

In early 1998, Defendant AAA agreed to provide Plaintiff with all materials generated by it in digital form. However, according to Plaintiff, Defendant AAA has supplied the digital materials in a haphazard and intermittent manner, with some materials being damaged upon arrival. At other times, no digital materials were supplied. Allegedly, Defendant AAA has also administered the arbitration proceeding in a discriminatory manner at times by faxing written materials to Defendant General Design and mailing materials to Plaintiff. Additionally, Defendant AAA has neglected and/or refused to require Defendant General Design to supply Plaintiff written and printed materials, including architectural drawings, in digital form. Further, Defendant General Design has refused to provide Plaintiff with written materials in digital form, contending that it is not required by law to provide any accommodation because the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., is not applicable. Defendant General Design has also contested Plaintiff's claim that he is disabled despite Plaintiff providing Defendant with medical documentation.

Plaintiff claims that the above alleged actions and omissions of Defendants constitute discrimination in violation of Titles II and III of the ADA and of the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.065.

II

Defendants have moved to dismiss this action, contending that Plaintiff has failed to state a claim upon which relief can be granted with respect to Plaintiff's claims under the ADA and under the MHRA.

The ADA, in pertinent part, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. As used in this statute, the term "public entity" is defined as any state or local government, department, agency, special purpose district, or other instrumentality of a state or local government, and certain commuter authorities. See 42 U.S.C. § 12131(1); see also 28 C.F.R. § 36.104.

The ADA further provides in relevant part that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). A "place of public accommodation" means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories:

> (A) an inn, hotel, motel, or other place of lodging . . .;
> (B) a restaurant, bar, or other establishment serving food or drink;
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or

lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place or exercise or recreation.

42 U.S.C. § 12181(7); see also 28 C.F.R. § 36.104.

III

In his amended complaint, Plaintiff alleges that Defendant General Design is a "public entity" within the meaning of 42 U.S.C. § 12131(1)(B) in that it is an "instrumentality" of the Circuit Court of Taney County, Missouri in connection with its motion to compel arbitration. Plaintiff also alleges that Defendant AAA is a "public entity" in that it is an "instrumentality" of the Taney County Circuit Court in connection with providing arbitration services to Basnett Enterprises and Defendant General Design. In contrast, Defendants each argue that they are not "public entities" within the meaning of the ADA.

Based upon a review of the record, the Court finds that none of the Defendants is a "public entity" as defined by the ADA. Defendant General Design is a private corporation in the business of providing architectural services, while Defendant AAA is a private corporation that provides arbitration and resolution services. The other Defendants are individuals and therefore are not entities of any kind. Further, nothing in the record indicates that any Defendant is operated with public funds or that he, she, or it is a government entity. Moreover, the Court expressly rejects Plaintiff's claim that Defendant General Design's seeking to compel arbitration and Defendant AAA's facilitating arbitration between Plaintiff and Defendant General Design pursuant to a court order renders either an "instrumentality" of the Taney County Circuit Court. The Taney County Circuit Court has merely directed the parties to comply with the terms of their

own private agreement. These facts, therefore, fail to establish that any Defendant is a "public entity" for purposes of the ADA.

Plaintiff also alleges that Defendant General Design is a "public accommodation" for the delivery of architectural services within the meaning of 42 U.S.C. § 12181(7)(F) and Mo. Rev. Stat. § 213.010 (15), and that Defendant AAA is a "public accommodation" for the delivery of arbitration services within the meaning of the same provisions. Defendants, however, contend that they fall outside of this provision of the ADA and that the MHRA is equally inapplicable. Defendants also contend that with respect to the MHRA, Plaintiff has failed to exhaust his administrative remedies as required by the MHRA, thus, leaving this Court without jurisdiction to consider the merits of Plaintiff's claim under that statute.

Based upon a review of the record, the Court finds that none of the Defendants is a "place of public accommodation" under the ADA. As indicated above, a "place of public accommodation" means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of twelve categories identified by statute. No Defendant falls within any of the twelve "public accommodation" categories. Further, a "facility" is defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104. Under this definition, a "place of public accommodation" focuses on access to physical places, which renders Plaintiff's claims under this provision legally infirm, since he does not allege that he has been denied access to a physical place. Rather, Plaintiff only alleges that he has been denied an opportunity to participate equally in arbitration proceedings. Further, the services that both Defendant General Design and Defendant AAA provide are not closely connected to a particular facility or otherwise involve a "place of public accommodation." See Stoutenborough v. National Football League, Inc., 59 F.3d 580 (6th Cir. 1995); Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993); Elitt v. U.S.A. Hockey, 922 F. Supp. 217

(E.D. Mo. 1996). Moreover, because no Defendant is a "place of public accommodation," Plaintiff has failed to establish a claim based on the ADA.

The Court further finds that it does not have jurisdiction to reach the merits of whether Plaintiff has a claim under the MHRA, since Plaintiff has failed to meet the requirements of this statute. Specifically, Mo. Rev. Stat. § 213.111 provides that a person must receive a right to sue letter from the Missouri Commission on Human Rights ("MCHR") before he or she may bring a civil action based on an alleged discriminatory act. See Roberts v. Panhandle Eastern Pipeline Co., 763 F. Supp. 1043, 1048 (W.D. Mo. 1991). Plaintiff's amended complaint, however, only alleges that it has submitted a complaint to the MCHR, with no indication that he has received the requisite right to sue letter or that the MCHR has otherwise failed to act. See Gipson v. KAS Snacktime Co., 83 F.3d 225, 228 (8th Cir. 1996). Accordingly, Plaintiff has not satisfied the requirements of the MHRA, thus rendering this Court without authority to consider the merits of his state law claims.

For the foregoing reasons, each of the respective motions to dismiss by Defendant AAA (Docket # 48), and the other Defendants (Docket # 49) is hereby granted. As noted above, this disposition renders moot these same Defendants' original motions to dismiss (Docket # 10 and Docket # 14). In addition, the motion to dismiss by Defendants Jerome V. Bales, and the law firm of Wallace, Saunders, Austin, Brown & Enoch, (Docket # 32) is hereby granted, and their initial motion to dismiss (Docket # 12) is moot. See supra note 1. Lastly, in light of the disposition of this action, Plaintiff's motion for an injunction (Docket # 16) is moot.

IT IS SO ORDERED.

This 2ND day of December, 1998.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OZARK-MAHONING COMPANY, a Delaware Corporation,

Plaintiff,

vs.

DEERE & COMPANY, a Delaware corporation; ENSERCH CORPORATION, f/k/a NIPAK, INC., a Texas corporation and JOHN DEERE CHEMICAL COMPANY, a foreign corporation,

Defendants.

Case No. 97-CV-456-K(W)

ENTERED ON DOCKET

DATE 12-4-98

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff Ozark-Mahoning Company and the Defendants Deere and Company and Enserch Corporation and pursuant to Fed.R.Civ.P. 41(a)(1) stipulate to the dismissal of this action with prejudice to its re-filing with each and every party to bear its own costs and fees herein.

Respectfully submitted,

R. Casey Cooper, OBA No. 1897
R. Kevin Layton, OBA No. 11900
Boesche, McDermott & Eskridge, L.L.P.
100 West 5th Street, Suite 800
Tulsa, Oklahoma 74103-4216
(918) 583-1777 Telephone
(918) 592-5809 Facsimile

ATTORNEYS FOR OZARK-MAHONING COMPANY

Robert P. Redemann, OBA No. 7454
Jo Anne Deaton, OBA No. 5938
Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C.
100 West 5th Street, Suite 400
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173 Telephone
(918) 592-3390 Facsimile

ATTORNEYS FOR DEERE AND COMPANY

Blake K. Champlin, OBA No. 11788
Jamie Taylor Boyd, OBA No. 13659
Shipley, Jennings & Champlin, P.C.
201 West 5th Street, Suite 201
Tulsa, Oklahoma 74103
(918) 582-1720 Telephone

ATTORNEYS FOR ENSERCH CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DARRELL BURSON,)
)
Plaintiff,)
)
vs.) Case No. 97-CV-863-E(M)
)
RUPERT BRENT JOHNSON, GLOBAL)
INTERFACE SOLUTIONS, INC., and IDG,)
INC.,)
)
Defendants.)

JUDGMENT

In accord with the Findings of Fact and Conclusions of Law filed this date wherein the Court finds that the copyrights at issue are "works made for hire" owned by defendants, the Court hereby enters judgment in favor of the Defendants, Rupert Brent Johnson, Global Interface Solutions, Inc., and IDG, Inc., and against the Plaintiff, Darrell Burson. Plaintiff shall take nothing of his claim.

DATED, THIS 2nd DAY OF DECEMBER, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DARRELL BURSON,

Plaintiff,

vs.

RUPERT BRENT JOHNSON, GLOBAL INTERFACE SOLUTIONS, INC., and IDG, INC.,

Defendants.

Case No. 97-CV-863-E(M)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried before the Court without a jury on July 20-22, 1998. The only issue for determination by the Court was whether Plaintiff's computer programs are works made for hire as defined by 17 U.S.C. §101. Upon consideration of the pleadings, briefs, evidence and arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Court has exclusive jurisdiction over this action relating to copyrights by reason of 28 U.S.C. §1338(a).

2. Plaintiff Darrell Burson ("Burson") is a resident of the State of Indiana.

3. Defendant Rupert Brent Johnson ("Johnson") is a resident of the State of Oklahoma.

4. Defendant I.D.G., Inc. ("IDG-OK") is an Oklahoma corporation with its principal place of business in the State of Oklahoma.

5. Interface Design Group, Inc., a partnership ("IDG-p") is a California general partnership.

6. Interface Design Group, Inc., ("IDG-CA") is a California corporation.

7. Defendant Global Interface Solutions, Inc. ("GIS") is an Oklahoma corporation owned entirely by Johnson.

8. Diversified Data Resources, Inc. ("DDR") is a California corporation that markets computer hardware and software to users of mainframe computers.

9. Burson has registered fifty computer programs for copyright. Each of the programs was a separate registration and each claimed to be a "contribution" to a "collective work" titled "Supervision 3". These programs were specifically intended to function with and be part of the independent whole called Supervision 3. Burson makes no claim to Supervision 3. His claim is limited to the fifty programs.

10. It is Burson's contention that he was the author of the fifty programs during 1990-1992 as an "independent contractor".

11. The Defendants contend that Burson was an employee during the period 1990-1992 and that his authorship of the fifty programs was within the scope of that employment.

12. Burson's relationship with the IDG entities began in 1986 first with IDG-p, then with IDG-CA in 1989, and IDG-OK in 1992. It terminated in 1993.

13. During the period 1986 through 1989, Burson worked for IDG-p writing "microcode" (a form of software). He also developed hardware that used the microcode. Burson and Johnson were the sole partners of the IDG-p. Burson signed a "partner's proprietary information agreement" regarding his work at IDG-p. The IDG-partnership had only one full-time and one or two part-time employees in addition to Johnson and Burson.

14. After the formation of IDG-CA, Burson became an employee of that corporation. He received a regular salary check, with normal tax deductions, received employee benefits of

health insurance and vacation pay and was entitled to use the equipment of IDG-partnership and IDG-CA. After the formation of IDG-CA, he no longer received regular monthly compensation from the partnership of $2,500.00 per month, but began receiving $4,500.00 per month salary from IDG-CA. His salary remained the same until he became employed by IDG-OK.

15. After IDG-CA was formed, all the employees of the IDG-partnership became employees of IDG-CA. Burson and Johnson became employees of IDG-CA and the partnership no longer made the payroll. When IDG-OK was formed, the ownership of IDG-CA was 30% to Burson and 70% to Johnson.

16. Johnson signed an "employee proprietary information agreement" for IDG-CA. The evidence compels a finding that Burson signed one also, although he testified that he did not recall signing one.

17. During the period 1989-1993 both IDG-CA and later IDG-OK had approximately 6-7 employees.

18. There were times after October 1990 in which 100% of Burson's work was writing code for the Supervision 3 project.

19. Burson was joined in the task of writing the "pieces" of Supervision 3 code by Lawrence Johnstone, another IDG-CA employee. Johnstone was added to the project because of Johnson's desire to move along more quickly. Johnson's function was to make the "architectural" decisions regarding how the component parts of the program would be created and interact. The actual work was left to Johnstone and Burson. While the work was being performed, Johnson, Burson and Johnstone worked within fifty feet of each other.

20. It was the intention of the parties that Supervision 3 was to be used by the same customers who were using its predecessors, Supervision l and Supervision 2.

21. Assembler computer code was the computer language in which Supervision 3 was written. During the period Burson was employed by IDG-CA and writing microcode the partnership paid nothing to IDG-CA for his work in writing microcode even though he was receiving a salary from IDG-CA and not IDG-partnership.

22. It was the intention of the parties that the fifty component pieces which are an interdependent part of Supervision 3 were intended for customers and were intended to be "ever changing" and "evolve over time".

23. Burson considered Lawrence Johnstone, an employee of IDG-CA, and David Whipple, an employee of IDG-OK, to be "developers" of Supervision 3.

24. Johnson directed that certain milestones for progress of the developing software be met, primarily for marketing purposes. Burson attempted to meet the deadlines set by Johnson.

25. Johnson, during the course of development of Supervision 3, instructed Burson to change the program so that it would be able to run "REXX" programs simultaneously. Burson was opposed to the change but complied and changed the program as instructed by Johnson. Burson was concerned that the change ordered by Johnson would cause the program to run out of memory. David Whipple, an IDG-OK employee, was used to work out a solution to this problem. After Whipple became involved, Burson was phased out of the Supervision 3 project because Johnson had decided that Burson's time would be better used on other projects. Burson disagreed with this decision but complied with it.

26. Johnson had majority ownership of IDG-partnership, IDG-CA, and IDG-OK and as such

exercised control over Burson who at all times was a minority interest holder in these entities.

27. During the period 1986 to 1993 neither Burson nor Johnson accounted for use of their time for any business entity concerned in these proceedings.

28. The subject 50 programs were written primarily at four different locations: Burson's home, at the corporation's offices in California and Oklahoma, and at customer sites.

29. IDG-partnership or IDG-CA equipment was utilized to write the programs. For programs written at customer sites, either IDG or the customer would provide the equipment. On those occasions when Burson was writing code at a customer's location his travel expenses were paid for by one of the IDG entities.

30. Johnson exercised his authority in requiring Burson to write code in compliance with Johnson's directions. Johnson made specific design requirements for the project; he designated specific attributes of the computer program and its functionality. Burson complied with Johnson's directions even though Burson considered some of the requirements to be dangerous.

31. Plaintiff and Johnson went to customer locations together and jointly observed operations and participated in installation.

32. Burson placed copyright notices on pieces of Supervision 3. He always placed both his and Johnson's name together as copyright owners. He never placed only his name on the copyright notices contained in the works. The fifty registered programs authored by Burson did not have any separate notice of contribution attribution to either Johnson or Burson.

33.

34. During most of 1992 Burson commuted between California and Oklahoma. IDG-CA was in the process of transition from California to Oklahoma. Burson's travel expense was paid by one of the IDG entities. Burson traveled to Oklahoma for IDG business and returned home to work on Supervision 3.

35. In September 1993 when Burson submitted his written resignation he intended to resign from all aspects of his business relationship with Johnson, including IDG-CA and IDG-OK.

36. David Whipple, an employee of IDG-OK made changes to code previously authored by Burson for Supervision 3. Burson was aware of this and had no objection to it. Whipple made additional changes following Burson's resignation in September 1993. Burson raised no objection to his code being used following his resignation. These changes altered a great portion of Burson's prior work.

37. Burson consented to and approved the changes made during his employment with IDG that had been performed by Whipple. Plaintiff in making his copyright registrations went back in time to find a prior generation of his work on the project so that it predated any work performed by Whipple.

38. Burson participated in the creation of the Supervision reference manual. The manual states that Supervision 3 was "designed by R. Brent Johnson and Darrell Burson of Interface Design Group". Burson never raised an objection to this characterization.

39. During the relevant time periods Burson never took out workman's compensation insurance, never obtained any personal liability insurance and did not engage in any other type of independent business activity in the computer field.

40. Johnson was the boss of the IDG entities. Johnson paid close attention to what was going

on in the business and was in close contact with customers. He would issue orders to solve problems for the customers. His direction was followed by the employees, including Burson.

41. Both Burson and Johnson maintained regular office hours during the period September 1992 to September 1993. David Whipple was given a computer for work at home and was authorized to work at home while an employee of IDG-OK. David Whipple took over the Supervision 3 project while Burson was assigned to other company projects. Whipple reported more to Johnson than he did Burson regarding his progress on the project.

42. Burson, Johnson and Whipple held comparable computer coding skills.

43. During Burson's last year of employment with IDG-OK there were large number of version changes to Supervision 3.

44. Both oral and written reports were made to Johnson by Whipple regarding his progress on Supervision 3.

45. Once IDG-CA was formed the IDG partnership ceased to be an active business. It did, however, continue to receive income from royalties paid by IDG-CA or DDR.

46. In October 1990 Burson and Johnson discussed development of Supervision 3. They contemplated that Burson's work on Supervision 3 was to be a full-time project. In order to provide Burson with a raise in his salary, Johnson created a method whereby he would receive in addition to his salary the percentage of money that Johnson was receiving from distribution of his personally owned software.

47. Plaintiff would provide to Johnson on a regular basis copies of the source code he was preparing on Supervision 3.

48. The source code would be received by Johnson and he would perform a significant amount

of testing on it.

49. Johnson had the ultimate design authority to determine what functionality would be performed by Supervision 3 and what functionality would be performed by hardware which works in conjunction with Supervision 3.

50. Burson, as an employee of IDG-CA was involved in interview and selection process of employing assistants or other employees to perform work for the company.

51. Burson's compensation for working on the Supervision 3 software was a combination of his existing salary and the bonus that Johnson arranged to be paid by DDR.

52. In October of 1990 when Burson and Johnson discussed the Supervision 3 project, Burson was a full-time employee of IDG-CA, receiving a regular salary with normal employee deductions and employee benefits. At the time of these discussions, IDG-CA was in the business of creating software and source code along with computer hardware design. Part of Burson's duties as a regular employee of IDG-CA was to author software. The writing of computer programs was the business of the Defendants Johnson, IDG-partnership, IDG-CA and IDG-OK. The employees of these entities, including Burson were involved in the daily activity of writing computer programs. The evidence clearly establishes that Burson was an employee of these entities during the period of the development of the fifty computer programs at issue here.

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court to address the issues of copyright infringement pursuant to 28 U.S.C. §1338.

2. Pursuant to the agreement of the parties contained in the pre-trial order, the "work made for hire" issue was the sole issue for determination by the Court.

3. "Work made for hire" is defined in 17 U.S.C. §101 as follows:

> "(l) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

4. The result in this case is determined by the teaching of Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166 (1989) in which the Supreme Court established a 13-element test to determine whether the "hired party" is an employee within the meaning of 17 U.S.C. §101. Those elements are:

(1) the hiring party's right to control the manner and means by which the product is accomplished;

(2) the skill required;

(3) the source of the instrumentalities and tools;

(4) the location of the work;

(5) the duration of the relationship between the parties;

(6) whether the hiring party has the right to assign additional projects to the hired party;

(7) the extent of the hired party's discretion over when and how long to work;

(8) the method of payment;

(9) the hired party's role in hiring and paying assistants;

(10) whether the work is part of the regular business of the hiring party;

(11) whether the hiring party is in business;

(12) the provision of employee benefits;

(13) the tax treatment of the hired party.

Reid at 2178-2179.

5. The Court states in Reid that no one of these factors is determinative. Reid at 2178-2179.

6. An analysis of the facts in this case compared with the factors set forth in Reid compels the conclusion that Burson was an employee in regard to his work on the fifty programs, and that the fifty programs he authored are "works for hire" within the contemplation of §101. Application of these factors to this case show the following:

1. Johnson initiated the idea for new version of Supervision software and instructed Burson and other company employee on functionality of the computer program. Johnson made a series of design decisions which Burson implemented even while contending the specifications were "dangerous". Johnson, as an officer, director and employee of IDG-CA and later for IDG-OK controlled the manner and means of the product to be produced and coordinated the activities of several company employees who worked on Supervision 3. Johnson served as chief architect and designer for the computer program.

2. Johnson and other employees of the IDG entities, such as Johnstone and Whipple possessed skills equal to those of Burson in the art of software programming.

3. The computer equipment needed for the creation and testing of computer software was provided by the IDG entities. All of Burson's travel expenses were paid by the IDG entities.

4. Plaintiff kept regular office hours at IDG offices in California and later in Oklahoma. He also worked at home but the work at home was a regularly authorized part of his typical work week. Burson's work was closely supervised by Johnson.

5. Plaintiff's employment by the IDG entities was long-term from 1986 until 1993. During this period he was an officer, director and stockholder of IDG-CA and then IDG-OK. He was also a partner in the IDG partnership. He signed employee proprietary information agreements with IDG-CA and IDG-OK which acknowledged his employee status with those businesses.

6. Johnson, as president of IDG-CA and IDG-OK, had full authority to reassign Plaintiff on to the Supervision 3 project and later assign him off the project. Johnson had authority and exercised it in replacing Burson with Whipple for completion of the Supervision 3 project. Johnson also exercised authority to assign more personnel to the project.

7. Johnson exercised his authority by establishing a series of deadlines for which Burson was to have a certain degree of progress completed. Johnson at all times reviewed Burson's progress and timeliness. Burson maintained a normal office routine and functioned on a daily basis as an employee.

8. Burson was paid as a regular employee throughout his work on the

Supervision 3 project with normal employee benefits and tax deductions. He did receive a bonus from Defendant Johnson's separate monies paid solely by a third party (DDR). This bonus was only paid for the period October 1990 until July 1991 when DDR ceased making payments to either Johnson or Burson. There was no variance in Burson's salary regardless of how much or little time he spent on the Supervision 3 project.

9. Burson could hire assistants but this discretion was always subject to Johnson's final approval. Any assistant who worked on Supervision 3 was an employee of IDG-CA or IDG-OK, and as such, received normal salaries, employee benefits and tax deductions.

10. The creation of software was the business of IDG-CA and IDG-OK. IDG-OK and IDG-CA were in the business of creating software with regular offices, office machinery and employees. Burson and Johnson together with all other employees of IDG-CA and IDG-OK received a regular salary from which was withheld social security taxes and employee benefits.

7. In the instant case, as opposed to Reid, there is no claim for "joint author" status. Plaintiff has no ownership in the fifty registered computer programs which are the subject matter of this action. The programs sued upon are works made for hire as defined by 17 U.S.C. §101.

8. Any Finding of Fact which more properly should be considered as a Conclusion of Law and any Conclusion of Law which more properly should be considered as a Finding of Fact will be so considered.

DATED THIS 2d DAY OF DECEMBER, 1998.

JUDGE JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROY T. VAN METER,

Plaintiff,

v.

LOWE'S HOME IMPROVEMENT WAREHOUSE, INC, a/k/a LOWE'S HOME CENTERS, INC.,

Defendant.

Case No. 98-CV-882-H

ORDER

This matter comes before the Court on a notice of removal (Docket # 1) by Defendant Lowe's Home Improvement Warehouse, Inc., a/k/a Lowe's Home Centers, Inc. ("LHI"). Plaintiff originally brought this action in the District Court of Tulsa County, and his Petition alleges that Defendant negligently stacked shelves the collapse of which caused Plaintiff to sustain personal injuries. In his Petition, Plaintiff seeks damages in excess of $10,000.[1]

Defendant removed this action to this Court on the basis of diversity jurisdiction. Defendant contends that diversity jurisdiction is properly invoked here because LHI is a foreign corporation incorporated in North Carolina with its principal place of business in North Carolina, and because Mr. Meter is a citizen of Oklahoma. Defendants further contend the federal jurisdictional amount in controversy is met, stating:

> the matter in controversy exceeds, exclusive of costs and disbursements, the sum of $75,000.00.

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[1]In Oklahoma, the general rules of pleading require that:

> [e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars ($10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars ($10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

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Def. Notice of Removal, ¶ 4 (Docket # 1).

Section 1447 requires that a case be remanded to state court if at any time before final judgment it appears the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Initially, the Court notes that federal courts are courts of limited jurisdiction. With respect to diversity jurisdiction, "[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed $75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than $75,000. The Tenth Circuit stated:

> [t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds [$75,000]." Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson's, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins.. Group, Individually and d/b/a Hartford Underwriters Ins.. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, "both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice." Laughlin, 50 F.3d at 873. See Associacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993) (finding defendant's conclusory statement that "the matter in controversy exceeds [$75,000] exclusive of interest and costs" did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc, 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds $75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds $75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than $75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds $75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

In the instant case, in his Petition, Plaintiff has asserted only one claim for relief that exceeds $10,000. Therefore, the amount in controversy is not met by the face of the Petition. In its notice of removal, Defendant failed to set forth any specific facts that demonstrate the federal

amount in controversy has been met. Accordingly, the Court finds that Defendant's conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. The Court concludes that removal is improper on the basis of diversity jurisdiction since it has not been established, either in Plaintiff's Petition or in Defendant's notice of removal, that the amount in controversy here exceeds $75,000.

Based upon a review of the record, the Court holds that Defendant has not met its burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Tulsa County. Accordingly, the Court hereby denies Defendant's removal of this case to federal court and orders the Court Clerk to remand the case to the District Court in and for Tulsa County. As a result, Plaintiff's motion for remand (Docket #7) is moot.

IT IS SO ORDERED.

This 3rd day of December 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT DWAYNE LAMPKIN

Plaintiff,

v.

MCDONNELL DOUGLAS-TULSA, a division of THE MCDONNELL DOUGLAS CORPORATION, et al.,

Defendants.

Case No. 93-CV-200-E (EA)

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 2nd day of December 1998, comes on before me, the undersigned judge, the Joint Application For Order of Dismissal With Prejudice in the above referenced matter, filed jointly by the Plaintiff, Robert Dwayne Lampkin, and the Defendants, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); Local No. 1093 of The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and McDonnell Douglas-Tulsa (a division of McDonnell Douglas Corporation). The Court, being fully advised in the premises, finds that the final Judgment entered herein has been reversed by the Tenth Circuit and remanded for entry of a new judgment herein, and in the interim, that the parties have settled this matter and desire to have the case dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be and same is hereby dismissed with prejudice, each party to bear his or its own fees and costs.

James O. Ellison, Sr., U.S. District Judge

PCDOCS #9361

Approved:

Jon B. Comstock
Attorney for Plaintiff

Steven R. Hickman
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES BAUHAUS,

Plaintiff,

vs.

No. 98-CV-754-E (EA)

FRANK McCARTHY, Magistrate Judge of the United States District Court for the Northern District of Oklahoma; and SVEN ERIK HOLMES, United States District Judge for the Northern District of Oklahoma,

Defendants.

ORDER

Plaintiff, a prisoner confined at the Oklahoma State Penitentiary in McAlester, Oklahoma, seeks to bring this 42 U.S.C. § 1983 civil rights suit *in forma pauperis* against United States Magistrate Judge Frank McCarthy and United States District Judge Sven Erik Holmes. On October 16, 1998, the United States of America, on behalf of Defendants, filed a motion to dismiss (Docket #3). Plaintiff has not filed a response to the motion to dismiss. For the reasons discussed below, the Court finds the motion to proceed *in forma pauperis* should be granted, the motion to dismiss should be granted, and the complaint dismissed with prejudice as frivolous. Any pending motion should be denied as moot.

ANALYSIS

A. Payment of Filing Fee

Based on representations in the motion for leave to proceed *in forma pauperis*, it appears Plaintiff is without sufficient funds to prepay the $150.00 filing fee. Therefore, the Court finds the motion for leave to proceed *in forma pauperis* should be granted. Nonetheless, the PLRA requires

the district court to assess and collect the $150 filing fee even when a case is dismissed. See 28 U.S.C. § 1915(b)(1). As of the date of Plaintiff's financial certificate, Plaintiff lacked funds to make even an initial partial fee payment. However, the trust fund officer at the Oklahoma State Penitentiary is hereby ordered to collect, when funds exist, monthly payments from Plaintiff's prison account(s) in the amount of 20% of the preceding month's income credited to the account. Monthly payments collected from Plaintiff's prison account(s) shall be forwarded to the Clerk of Court each time the account balance exceeds $10 until the full $150 filing fee is paid. Separate deductions and payments shall be made with respect to each action or appeal filed by Plaintiff. **All payments shall be sent to the Clerk, 411 United States Courthouse, 333 West Fourth Street, Tulsa, Oklahoma 74103-3819, Attn: PL Payments**, and **shall clearly identify Plaintiff's name and the case number assigned to this action.** The Clerk shall send a copy of this Order to the trust fund officer at the Oklahoma State Penitentiary, P.O. Box 97, McAlester OK 73502-0097.

B. Dismissal of action

Pursuant to the provisions of the *in forma pauperis* statute, this Court must dismiss the complaint, or any portion of the complaint, if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). While *pro se* complaints are held to less stringent standards and must be liberally construed, nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Haines v. Kerner, 404 U.S. 519, 520 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Three grounds justifying dismissal of this action are proposed in the motion to dismiss. The Court will consider each proposed ground.

1) Jurisdiction

42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient, a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law "of any State or Territory." Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under

section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

Defendants McCarthy and Holmes, as members of the federal judiciary, cannot act under color of state law as required under section 1983. See Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (the state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor). Plaintiff has not alleged that the federal officials in this case acted under anything other than federal law, and as a result, section 1983 does not apply to his suit. Therefore, Plaintiff's claims against U.S. Magistrate Judge McCarthy and U.S. District Judge Holmes could be dismissed for lack of jurisdiction, as urged in the motion to dismiss.

However, this Court recognizes the general principle of affording *pro se* litigants' pleadings liberal construction. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). Therefore, although Plaintiff does not cite 28 U.S.C. § 1331, as discussed in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), as the basis for jurisdiction, the Court liberally construes the complaint as a Bivens action and finds the invocation of jurisdiction satisfactory. See Tripati v. United States Immigration and Naturalization Service, 784 F.2d 345, 346 n.1 (10th Cir. 1986); Porter v. Windham, 550 F. Supp. 687, 689 (W.D. Okla. 1981).

*2) **Absolute Immunity***

Plaintiff's claims are based on Defendants' handling of his habeas corpus petitions filed in Case Nos. 96-CV-929-H and 96-CV-1033-H. Plaintiff alleges that Defendants showed bias by "causing extreme delays & refusing to accept irrefutable proof of innocence." (#1 at 2) Plaintiff claims that on more than one occasion Defendants unfairly granted the Attorney General of

Oklahoma extensions of time in which to reply to Plaintiff's habeas petitions, before ultimately denying the relief sought. In his prayer for relief, Plaintiff requests "recusal" of Defendants from his most recently filed habeas corpus case, Case No. 98-CV-725-K (M).

It is well-established that a judge is absolutely immune from civil liability for acts performed in his/her judicial capacity. Mireles v. Waco, 502 U.S. 9, 12 (1991). Judicial immunity is an immunity from suit, not just from ultimate assessment of damages. Id. (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); see also Forrester v. White, 484 U.S. 219, 227-29 (1988); Stump v. Sparkman, 435 U.S. 349, 360 (1978)); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (applying judicial immunity to actions under 42 U.S.C. § 1983); Van Sickle v. Holloway, 791 F.2d 1431, 1435-36 (10th Cir. 1986). In the instant case, even after liberally construing Plaintiff's *pro se* pleading, Hall, 935 F.2d at 1100, the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that because any alleged constitutional violations committed by Defendants involved acts performed in their judicial capacities, these Defendants are absolutely immune from suit. Therefore, Plaintiff's claims are legally frivolous and his complaint should be dismissed with prejudice.

3) Transfer of Case No. 98-CV-725-K

As stated above, in his prayer for relief, Plaintiff states he seeks "recusal of def's from 98-CV-725-K (M)." (#1 at 5). A review of the record for Case No. 98-CV-725-K reveals that it is a habeas corpus action filed by Plaintiff on September 22, 1998. The case was assigned to Chief Judge Terry C. Kern. On October 6, 1998, Judge Kern found the petition to be a second or successive petition for writ of habeas corpus and, pursuant to 28 U.S.C. § 2244(b), transferred the petition to

the Tenth Circuit Court of Appeals for authorization. Since Case No. 98-CV-725-K has been transferred, this District Court no longer has jurisdiction of that case. Therefore, without comment on the propriety of the relief sought in this action, this Court could consider the request only if the Tenth Circuit authorizes Plaintiff to file a second or successive petition in this Court thereby conferring jurisdiction over the petition. Because to date the Tenth Circuit has not authorized Plaintiff to file a second or successive petition, the Court concludes the instant action, based on the relief sought, is subject to dismissal without prejudice.

CONCLUSION

Plaintiff's motion to proceed *in forma pauperis* should be granted. However, Plaintiff must nonetheless pay the $150 filing fee in full. 28 U.S.C. § 1915(b).

After liberally construing Plaintiff's allegations, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that these Defendants are absolutely immune from suit. Therefore, Defendants' motion to dismiss should be granted and Plaintiff's complaint should be dismissed with prejudice as frivolous. This dismissal should count as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).[1]

[1] According to 28 U.S.C. § 1915(g), "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious , or fails to sate a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed *in forma pauperis* is **granted.** Nonetheless, Plaintiff shall make monthly payments of 20% of the preceding month's income credited to his account(s) until the filing fee of $150 is paid in full. Prison officials having custody of Plaintiff shall forward payments from Plaintiff's account(s) each time the amount in the account(s) exceeds $10 until the filing fee is paid to the Court at the following address: **Clerk, 411 United States Courthouse, 333 West Fourth Street, Tulsa, Oklahoma 74103-3819, Attn: PL Payments**, and **shall clearly identify Plaintiff's name and the case number assigned.**

2. Defendants' motion to dismiss (#3) is **granted.**

3. This action is **dismissed with prejudice** as frivolous pursuant to 28 U.S.C. 1915(e)(2)(B).

4. The Clerk of the Court is directed to "**flag**" this dismissal as a "prior occasion" for purposes of §1915(g).

5. The Clerk shall send a copy of this Order to the trust fund officer at the Oklahoma State Penitentiary, P.O. Box 97, McAlester OK 73502-0097.

6. Any pending motion is denied as moot.

SO ORDERED THIS 2nd day of ~~November~~ December, 1998.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES WAYNE GEORGE,

Petitioner,

v.

STORMY WILSON,

Respondent.

Case No. 96-CV-1075-K (E)

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner Charles Wayne George filed a Petition for Writ of Habeas Corpus. Acting *pro se*, petitioner challenges the sentences he received after pleading guilty to two counts of larceny of merchandise from a retailer after former conviction of a felony. He also alleges ineffective assistance of counsel. After his case was transferred to this district, he raised an issue regarding his own competency to plead guilty. Respondent filed a motion to dismiss for failure to exhaust state court remedies, and, after petitioner offered to withdraw his incompetency claim, the District Court gave petitioner an opportunity to file an amended petition. Petitioner filed his Amended Petition for Writ of Habeas Corpus, reasserting, *inter alia*, his incompetency claim. In defense, respondent argues that petitioner's claims are procedurally barred.

This case was referred to the undersigned for a report and recommendation. *See* 28 U.S.C. § 636, and § 2254, Rules 8, 10. Based on a review of the record and the parties' briefs, the undersigned proposes findings that petitioner's sentencing claim is procedurally barred, and his incompetency and ineffective assistance of counsel claims are without merit. For these reasons, as discussed below, the undersigned recommends that petitioner's Amended Petition for Writ of Habeas Corpus be **DENIED**.

BACKGROUND AND PROCEDURAL HISTORY

On June 30, 1992, petitioner entered a guilty plea on two counts of larceny of merchandise from a retailer after former conviction of a felony ("A.F.C.F."). The terms of his plea bargain included a sentence for two concurrent 30-year terms. Petitioner was sentenced on July 10, 1992, in the District Court of Tulsa County, State of Oklahoma, Case Nos. CRF-92-1665 and CRF-92-2628. He subsequently filed an application for post-conviction relief, alleging that he received (1) an excessive sentence, (2) improper sentence enhancement, and (3) ineffective assistance of counsel. Petitioner relied upon Okla. Stat. tit. 21, § 1731 (1991) and Okla. Stat. tit. 21, § 51 (1991). The application was denied on February 27, 1996.

In its Order Denying Application for Post-Conviction Relief, the trial court held that the petitioner's allegation of ineffective assistance of counsel was without merit, and that petitioner had waived the remaining issues because he had failed to file a timely direct appeal. The trial court nonetheless addressed the merits of petitioner's sentencing claims, and found them to be without merit as well. (Dkt. #17, Ex. A.) The Oklahoma Court of Criminal Appeals ("OCCA") affirmed the trial court's denial of post-conviction relief on July 1, 1996, holding that petitioner's claims were procedurally barred because he failed to file a motion to withdraw his guilty plea or a direct appeal within the applicable time periods or to raise any issues that could not have been raised in such a motion or appeal. (Dkt. #17, Ex. C.)

Petitioner filed a Petition for Writ of Habeas Corpus ("Petition") on August 14, 1996, in the United States District Court for the Eastern District of Oklahoma, Case No. 96-395-B. (N.D. Okla. Dkt. #1, E.D. Okla. Dkt. #1) Petitioner is incarcerated in Muskogee, which is within the jurisdiction of the United States District Court for the Eastern District of Oklahoma. He is proceeding *pro se.*

Petitioner was granted leave to proceed *in forma pauperis* on September 9, 1996. In his first habeas petition, petitioner set forth the same grounds for relief as set forth in his Application for Post-Conviction Relief, and on which the OCCA based its decision. However, petitioner did not brief his claim of ineffective assistance of counsel.

The matter was transferred to the United States District Court for the Northern District of Oklahoma by Order dated November 19, 1996 because the petitioner was convicted in Tulsa County, which is within the jurisdiction of the Northern District. (Dkt. #1.) On December 11, 1996, petitioner filed a motion for leave to file a second motion to supplement or amend (Dkt. # 2), raising, for the first time, an issue of competency. Petitioner alleged that he could have proven at the time he entered his guilty pleas that he was more likely than not incompetent to plead guilty, but he opted not to establish his incompetency because of the "clear and convincing evidence" standard of Oklahoma competency statute, which has been ruled unconstitutional by the United States Supreme Court since petitioner's sentencing.

United States Magistrate Judge John Leo Wagner entered an Order on April 9, 1997, granting petitioner's motion for leave to file supplemental or amended petition. (Dkt. #3.) On May 9, 1997, the Oklahoma Attorney General filed a motion to dismiss for failure to exhaust state court remedies and a motion to dismiss.[1] (Dkt. #6.) On May 28, 1997, petitioner filed a request for entry of default (Dkt. #8). On May 29, 1997, petitioner then filed another motion to amend as a response to the Attorney General's motions to dismiss. (Dkt. #9) Petitioner conceded that the Attorney General is

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[1] The Attorney General moved to dismiss himself as an improper party because he did not have custody of the petitioner and the record did not establish any future sentence for petitioner to serve. *See* 28 U.S.C. § 2253, Rule 2(b). Although the Attorney General was dismissed, he subsequently responded on behalf of the defendant warden, Stormy Wilson.

not a party to the action, claiming that he "inadvertently checked the box allocated for that purpose." With regard to his incompetency claim, however, he made no reference to his failure to raise that issue in the state courts, but merely argued that he should be permitted to amend or resubmit his habeas petition to present only exhausted claims to the District Court.

On May 30, 1997, Magistrate Judge Wagner recommended that the Attorney General's motions to dismiss be granted. (Dkt. #10.) Petitioner objected on June 9, 1997 (Dkt. #11), and renewed his motion for default judgment on September 18, 1997.[2] On September 22, 1997, the magistrate denied petitioner's three motions to supplement/amend, but stated that "[p]etitioner is granted leave to reurge the motions in the event that the district court does not affirm the May 30, 1997 recommendation." (Dkt. #13.)

The District Court did not fully affirm the magistrate's recommendation. On November 7, 1997, the District Court overruled the recommendation that respondent's motion to dismiss for failure to exhaust state remedies be granted. (Dkt. #14.) The District Court specifically noted that petitioner requested, in his third motion to amend, that he be permitted to withdraw his unexhausted claim. Accordingly, the District Court granted the petitioner's third motion to amend, vacated the magistrate's September 22, 1997 Order, and directed the petitioner to submit an amended petition identifying each claim allegedly entitling him to habeas corpus relief. In so doing, the District Court stated: "Petitioner is further advised that, pursuant to 28 U.S.C. § 2254(b), this Court cannot consider a claim unless the petitioner has exhausted the remedies available in the courts of the State. If even one unexhausted claim is included in the amended petition, the entire amended petition must

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[2] Petitioner declared in his motions for default judgment that he was "not an incompetent person . . . ." (Dkt. #12)

be dismissed for failure to exhaust state remedies if a state remedy is available." (Dkt. #14, at 3.) The District Court also denied petitioner's request for default judgment.

On November 25, 1997, petitioner filed an Amended Petition for a Writ of Habeas Corpus ("Amended Petition"), setting forth, as grounds for his petition, (1) "Excessive and Disporportinate [sic] sentence" (later characterized as "14th Amendment, Due Process Violation"); (2) "Improper Enhancements"; (3) "Incompetency"; and (4) "Erroneous instructions as to the range of punishment for the crime." The third and fourth grounds are later combined in the Amended Petition as the third ground. (Dkt. #15.) Petitioner asserts that he did not directly appeal the third issue because it was not available at the time, and he asserts, incorrectly, that he raised the third issue by means of a post-conviction motion. He contends that all grounds for relief were presented to the highest state court having jurisdiction.[3] Absent from petitioner's Amended Petition is any statement or argument regarding ineffective assistance of counsel other than "erroneous instructions as to the range of punishment for the crime."

Petitioner's brief in support of his petition is exactly the same as the Petition filed on August 14, 1996, in the Eastern District of Oklahoma. It reiterates the same arguments previously advanced for the first and second grounds in the Amended Petition, and it fails to even mention the third and fourth grounds (incompetency and erroneous instructions). Petitioner requests immediate relief, appointment of an attorney, oral argument, and vacation of the judgments upon which his

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[3] In the Amended Petition, petitioner incorrectly denied having previously filed any type of petition or motion in federal court regarding the conviction under attack. However, the amended petition is not a successive or subsequent petition contemplated by the AEDPA, *see* 28 U.S.C.§ 2244, because the District Court specifically directed the filing of an amended application. *Cf. Camarano v. Irvin*, 98 F.3d 44, 47 (2d Cir. 1996). The undersigned thus considers petitioner's error harmless.

convictions are based, or, in the alternative, an evidentiary hearing and a show cause examination. He also states, in his "Prayer for Relief," that he is not guilty of the crimes with which he was charged. (Dkt. #15.)

Respondent submitted a response on February 26, 1998.[4] Respondent contends that the claims raised by petitioner are procedurally barred because petitioner failed to file a motion to withdraw his guilty plea or to file a direct appeal with the OCCA in the event his motion to withdraw his guilty plea was denied by the trial court. (Dkt. #17.) Respondent did not move to dismiss petitioner's incompetency claim for petitioner's failure to exhaust his remedy on the incompetency issue in state court.

Petitioner filed an answer to the response, admitting his failure to file a direct appeal or a motion to withdraw his guilty plea and conceding that an evidentiary hearing is not necessary. Petitioner claims that he acted upon erroneous advice of counsel when he entered into the plea agreement, and that his application for post-conviction relief was based on newly-discovered evidence (which he contends is the same as his "gaining knowledge that he had been illegally sentenced"). (Dkt. #18.) Petitioner also asserts error by the trial judge in not establishing a factual basis for his guilty plea.

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[4] Respondent mistakenly contends that petitioner is incarcerated pursuant to a judgment and sentence entered in Muskogee County, and that petitioner was sentenced to concurrent 35-year terms. The undersigned does not consider these errors to be material to its recommendation.

DISCUSSION AND LEGAL ANALYSIS

Standard of Review

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 104 (1996).[5] The AEDPA established a more deferential standard of review of state court decisions in habeas corpus cases. Deference is appropriate in this matter as to the OCCA's decision regarding petitioner's sentencing claim, but not for his claim alleging ineffective assistance of counsel. The OCCA never passed upon petitioner's incompetency claim.[6]

Exhaustion of Remedies

Federal courts are prohibited from issuing writs of habeas corpus on behalf of a prisoner in state custody unless the prisoner has exhausted the available state court remedies if "state corrective process" is available and if circumstances do not exist that render the process "ineffective" to protect the prisoner's rights. 28 U.S.C. § 2254(b)(1); *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he

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[5] The AEDPA's amendments to 28 U.S.C. § 2254 became effective on April 24, 1996. Since petitioner filed his Petition for Writ of Habeas Corpus on August 14, 1996, the amended version of the statute is applicable to this matter even though his conviction became final before April 24, 1996. *See* 28 U.S.C. § 2244(d); *Hoggro v. Boone*, 150 F.3d 1223 (10th Cir. 1998). Respondent admits that the limitations period has not expired. (Dkt. #17.)

[6] Although petitioner failed to brief his incompetency and ineffective assistance claims in connection with his Petition or his Amended Petition, he did brief each in separate motions before and after the Amended Petition was filed. Since *pro se* petitions must be read liberally, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)), the undersigned construes petitioner's pleadings as asserting claims for incompetency and ineffective assistance of counsel.

has exhausted all available state remedies. *Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992). To exhaust a claim, petitioner must have "fairly presented" the facts and legal theory supporting a specific claim to the highest state court. *See Picard v. Conner*, 404 U.S. 270, 275-76 (1971); *Demarest*, 130 F.3d at 932. In Oklahoma, the highest state court for criminal matters is the Oklahoma Court of Criminal Appeals. The doctrine of exhaustion reflects the policies of comity and federalism. Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *see also Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *Demarest*, 130 F.3d at 932.

In this matter, petitioner fairly presented his sentencing and ineffective assistance of counsel claims to the highest state court. Thus, those claims are exhausted; petitioner's incompetency claim is not. Petitioner was alerted to this problem when respondent moved to dismiss the incompetency claim for petitioner's failure to exhaust state remedies. (Dkt. #6.) Respondent argued that petitioner had failed to raise the incompetency issue to the highest state court having jurisdiction, and, therefore, petitioner had raised an unexhausted claim. Respondent also noted that petitioner admitted in his Petition that he did not raise all issues to the highest court having jurisdiction. Respondent specifically refused to waive the exhaustion requirement. Petitioner was also alerted to the exhaustion requirement when the magistrate granted respondent's motion, and when the District Court entered its Order of November 7, 1997, which permitted petitioner to amend his petition. In that Order, the District Court granted petitioner's third motion to amend, in which he requested that he be permitted to withdraw his unexhausted incompetency claim. Despite the District Court's

explanation of the exhaustion requirement, petitioner alleged incompetence as a ground for relief in his Amended Petition.

Petitioner's action leaves three options for judicial consideration. The District Court may (1) dismiss the petition, leaving petitioner with yet another opportunity to return to state court or to amend and resubmit his habeas petition, *see Rose v. Lundy*, 455 U.S. 509 (1982);[7] (2) hold the claim procedurally barred from habeas review if "it is obvious that the unexhausted claim would be procedurally barred in state court," *Steele v. Young*, 11 F.3d 1518, 1523 (10th Cir. 1993) (citations omitted); or (3) deny the petition on the merits, 28 U.S.C. §2254(b)(2); *Hoxsie v. Kerby*, 108 F.3d 1239, 1242-43 (10th Cir.), *cert. denied*, 118 S. Ct. 126, 139 L. Ed.2d 77 (1997). While it is obvious that the unexhausted claim would be procedurally barred in state court, *see Walker v. State*, 940 P.2d 509 (Okla. Crim. App. 1997) and *Walker v. State*, 933 P.2d 327 (Okla. Crim. App.), *cert.denied*, 117 S.Ct. 2524 (1997), the Tenth Circuit has held that a procedural bar does not foreclose federal habeas review of substantive mental competency claims. *Nguyen v. Reynolds*, 131 F.3d 1340 (10th Cir. 1997), *cert. denied*, 119 S.Ct. 128, 67 U.S.L.W. 3233 (1998); *Sena v. New Mexico State Prison*, 109 F.3d 652 (10th Cir. 1997). Petitioner apparently misunderstood or simply disregarded the opportunity provided by the District Court to amend and resubmit his habeas petition without the

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[7] To the extent *Rose v. Lundy* mandated that "mixed" petitions containing both exhausted and unexhausted claims be dismissed, it has been superseded by the AEDPA. *See, e.g., Loving v. O'Keefe*, 960 F. Supp. 46 (S.D.N.Y. 1997); *Duarte v. Hershberger*, 947 F. Supp. 146 (D.N.J. 1996). The AEDPA provides: "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254 (b)(2).

unexhausted claim, but requiring that he return to state court would be inefficient and futile[8] because petitioner's incompetency claim is without merit.

Incompetency

In petitioner's second motion for leave to supplement or amend (Dkt. #2), he claimed that his incompetence arose from his inability to understand the charge against him or to communicate effectively with his defense attorney. He alleged that he and his defense counsel discussed the possibility of trying to prove his incompetence but "concluded that it would be useless and abandoned the idea because of the 'Clear and Convincing' standard set forth in 22 O.S.1991, § 1175.4 (B)." He wrote: "There was no choice but to abandon the competency question and proceed to plea as best as they could." (Dkt. #2, at 5.)

Subsequent to the trial court's denial of petitioner's application for post-conviction relief, but before the OCCA affirmed the denial, the United States Supreme Court held that Okla. Stat. tit. 22, § 1175.4(B) (1991) violated due process because it presumed that a defendant was competent to stand trial unless the defendant proves incompetence by clear and convincing evidence. *Cooper v. Oklahoma*, 517 U.S. 348 (1996). The proper standard of proof is preponderance of the evidence. *Id.* Petitioner contends that the *Cooper* opinion should apply retroactively, as a "new rule," because

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[8] *See Wallace v. Cody*, 951 F.2d 1170, 1172 (10th Cir. 1991) ("Because exhaustion would be futile . . . the district court improperly dismissed the habeas petition.")

of the analysis in *Teague v. Lane*, 489 U.S. 288 (1989).[9] Petitioner's contention is unavailing because both the Tenth Circuit and Oklahoma courts have held that *Cooper* did not create a "new rule" or intervening change in the law to be given retroactive effect on collateral review. *Lopez v. Douglas*, 141 F.3d 974, 976 (10th Cir.), *cert. denied*, __S.Ct.__, 1998 WL 689872 (Nov. 30, 1998); *Walker v. State*, 940 P.2d 509 (Okla. Crim. App. 1997); *Walker v. State*, 933 P.2d 327 (Okla. Crim. App. 1997).

The *Lopez* and *Walker* decisions make it clear that the incompetency issue was available at the time, and *Cooper* does not excuse petitioner's failure to raise it on direct appeal. However, petitioner's incompetency claim is not procedurally barred because competence to stand trial is deemed an aspect of substantive due process that cannot be waived. *Nguyen*, 131 F.3d at 1346; *Sena*, 109 F.3d at 654. Petitioner is entitled to an evidentiary hearing on the issue of whether he was competent to stand trial only if he presents evidence "sufficient 'to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' concerning his mental capacity." *Nguyen*, 131 F.3d at 1346 (quotations omitted); *accord Sena*, 109 F.3d at 655. In this matter, as in *Nguyen*, the petitioner has not presented evidence which raises a real, substantial and legitimate doubt as to his competency.

Indeed, the evidence suggests the contrary. Incompetency is measured by whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of

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[9] Under the first prong of the *Teague* analysis, a new rule is applied retroactively if the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)). Under the second prong, a new rule is to be applied retroactively if it requires the observance of "those procedures that are implicit in the concept of ordered liberty." *Id.*

rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." *Cooper*, 517 U.S. at 354 (quotations omitted); *Nguyen*, 131 F.3d at 1346. Petitioner admits that he and his defense counsel discussed the burden of proof required to prove incompetency (Dkt. #2, at 4), and his counsel advised him about the range of punishment for his crimes. (Dkt. #17, Ex. B, at 4; Dkt. #18, at 2-3.) There is no evidence in the record suggesting that petitioner had a prior history of mental illness or disorder, *see Sena*, 109 F.3d at 655, or that he displayed any irrational or unusual behavior during his proceedings before the trial court, *see Cooper*, 517 U.S. at 352, n.1.

The transcript of petitioner's plea and sentencing proceedings reflects a careful effort by the judge to determine that petitioner was competent and that petitioner fully understood the consequences of his guilty plea, including the statutes applicable to his sentencing. In response to questioning by the judge, petitioner's counsel represented that he was satisfied that petitioner understood all of his legal rights and was mentally competent to enter his guilty plea. (Dkt. #22, Tr. at 3.) Likewise, petitioner testified that there was nothing in his background pertaining to mental illness or treatment of mental disorders that would affect his ability to enter a plea of guilty. (*Id.*, Tr. at 4.) The judge made a specific finding that, based upon statements of counsel and questioning of petitioner, petitioner was mentally competent to enter a guilty plea. (*Id.*, Tr. at 12.) Petitioner's claim that he was incompetent at the time he pleaded guilty fails on the merits.

Procedural Bar

The OCCA did not reach the merits of petitioner's incompetency claim because it was not presented to the OCCA; the OCCA did not reach the merits of petitioner's sentencing and ineffective assistance of counsel claims because it held that they were procedurally barred. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the

state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds. *Coleman v. Thompson,* 501 U.S. 722, 729 (1991); *see also Maes v. Thomas,* 46 F.3d 979, 985 (10th Cir), *cert. denied,* 115 S. Ct. 1972 (1995); *Gilbert v. Scott,* 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." *Maes*, 46 F.3d at 985. A finding of procedural default is an "adequate" state ground if it has been applied evenhandedly "in the vast majority of cases." *Id.* (quoting *Andrews v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991)).

The OCCA imposed a procedural bar on Plaintiff's sentencing and ineffective assistance of counsel claims because "[p]etitioner did not file a motion to withdraw the guilty pleas within the applicable time periods, and thus failed and waived the right to appeal his convictions to this Court." (Dkt. #17, Ex. C) The OCCA also noted that petitioner failed to raise any issues that could not have been raised in a motion to withdraw guilty pleas and in a direct appeal of his conviction, or to explain why he failed to do so. The Court relied primarily upon Okla. Stat. tit. 22, § 1086 (1991), which provides:

> All grounds for relief available to an applicant under this [Post-Conviction Relief] act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately asserted in the prior application.

The OCCA's finding of a procedural default represents an independent state ground because it is the "exclusive basis for the state's holding," *Maes*, 46 F.3d at 985, and it is an adequate ground because the OCCA has consistently declined to review claims which could have been but were not raised on

direct appeal. Okla. Stat. tit. 22, § 1086 (1991); *Robinson v. State*, 818 P.2d 1250 (Okla. Crim. App. 1991).

Respondent relies upon petitioner's procedural default in response to the Amended Petition. Petitioner can rebut a claim of procedural default if he is able to show cause for the default and actual prejudice as a result, or demonstrate that a fundamental miscarriage of justice would result if the merits of his claims are not considered. *Coleman*, 510 U.S. at 750; *Demarest*, 130 F.3d at 941; *Steele*, 11 F.3d at 1521. The cause standard requires a petitioner to show "something external to [himself], something that cannot fairly be attributed to him . . ." that prevented him from complying with the state procedural rules. *See Coleman*, 510 U.S. at 753; *Demarest*, 130 F.3d at 941 (both cases citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Once cause is established, the petitioner must then show that he suffered "actual prejudice" as a result of the alleged violations of federal law. *E.g., Demarest*, 130 F.3d at 941.

A petitioner must at least make a "colorable showing" that he is factually innocent of the crime of which he was convicted to bring his claim within the "fundamental miscarriage of justice" exception. *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (citations omitted); *see also Sellers v. Ward*, 135 F.3d 1333, 1338 (10th Cir.), *cert. denied*, __S.Ct.__, 1998 WL 689990 (Nov.30, 1998); *Demarest*, 130 F.3d at 941-42. If valid, petitioner's claim of factual innocence of the prior conviction would rebut respondent's claim of procedural default, but petitioner has made no attempt

at showing factual innocence. Merely stating that "Petitioner is legally and factually not guilty of the crimes charged" in his "Prayer for Relief" is insufficient. (Dkt. #15)[10]

Petitioner appears to rely upon a cause and prejudice rebuttal by asserting, in effect, that his counsel's ineffective assistance constitutes cause for his failure to raise his sentencing claims. His lack of knowledge as to the legal basis for his sentencing claims seems to be his alleged cause for failing to raise his ineffective assistance of counsel claim. The alleged cause for his failure to raise his incompetency claim was, presumably, an intervening change in the law made possible by *Cooper*. Although petitioner did not explicitly argue that his counsel's ineffective assistance also constitutes cause for his failure to raise his incompetency claim, that argument is foreclosed, as set forth above, because the general rule foreclosing federal habeas review of procedurally barred issues does not apply to substantive mental competency claims. Nor does it apply to ineffective assistance of counsel claims, as discussed below.

Ineffective Assistance of Counsel

Constitutionally ineffective assistance of counsel may constitute cause for procedural default, *see, e.g., Coleman*, 501 U.S. at 753-55, but petitioner's ineffective assistance of counsel

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[10] Here, petitioner admitted in his plea colloquy that he was guilty of the offenses charged, and he has made no colorable showing to the contrary. (Dkt. #22, Tr. at 7-8.) Consequently, *Bousley v. United States*, ___U.S. ___, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (remanding to permit petitioner an opportunity to show actual innocence) is inapplicable.

claim does not constitute cause for his failure to appeal his sentencing.[11] Petitioner does not specifically describe the basis of the "erroneous advice" he was purportedly given by his attorney, but he faults his counsel for "allowing a plea agreement and subsequent sentence of thirty years for a misdemeanor which carried one year in the county jail." (Dkt. #18, at 3). He also states that he filed his post-conviction application "pursuant to newly discovered evidence (in this case the petitioner gaining knowledge that he had been illegally sentenced) and this fact was determined by petitioner some three years after sentencing." (*Id.*, at 2.) Petitioner's purported lack of knowledge as to the law applicable to his sentencing cannot serve as "cause" for his failure to assert his sentencing claims. "[P]etitioner's alleged lack of knowledge must be due to a lack of reasonable access to the rules as distinguished from basic ignorance of the rules of law." *Dulin v. Cook*, 957 F.2d 758, 760 (10th Cir. 1992). Petitioner has not alleged that he lacked access to the rules.

Hence, petitioner's principal claim is that counsel did not advise him to advance the flawed arguments regarding the alleged sentencing errors that petitioner advanced in his Application for Post-Conviction Relief and in his Amended Petition. The trial court properly rejected those arguments on their merits. (Dkt. #17, Ex. A) The trial court noted that, other than in petitioner's application brief, petitioner never indicated a desire to appeal his case or even discuss the possibility of appealing his case with his attorney. Moreover, petitioner did not take steps to perfect a timely

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[11] In the Amended Petition, he groups his incompetency and "erroneous instructions as to the . . . range of punishment" grounds for relief, claims that he raised them in the Post-Conviction Application (Dkt. #15, at 6-7), and states that he "did not Direct Appeal because these issues were not available at the time." (Dkt. #15, at 11.) From this series of events, it appears that petitioner's claim was more of an "afterthought" than something external to himself that would enable him to show cause for his default. *Cf. Steele*, 11 F.3d at 1524.

direct appeal. The OCCA affirmed, rejecting petitioner's arguments as procedurally barred. (*Id.*, Ex. C.)

Ineffective assistance of counsel claims are treated different from other habeas claims for purposes of applying Oklahoma's procedural bar. The Tenth Circuit has consistently held that the Oklahoma procedural bar on ineffective assistance of trial counsel claims not raised on direct appeal is inadequate because it denies defendants meaningful review of their ineffective assistance claims. *English v. Cody*, 146 F.3d 1257 (10th Cir. 1998); *Brewer v. Reynolds*, 51 F.3d 1519 (10th Cir. 1995), *cert. denied,* 516 U.S. 1123 (1996); *Brecheen v. Reynolds*, 41 F.3d 1343 (10th Cir. 1994). These decisions are based on the United States Supreme Court's view that a criminal defendant cannot adequately vindicate his Sixth Amendment right to the effective assistance of counsel at trial unless he is allowed to obtain an objective assessment of trial counsel's performance and to adequately develop the factual basis for any claim of ineffectiveness. *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986); *see also English*, 146 F.3d at 1261; *Osborn v. Shillinger*, 861 F.2d 612, 622-23 (10th Cir. 1988) (declining to apply Wyoming's procedural bar for ineffective assistance of counsel claims).

Under *English*, the Oklahoma procedural bar will not apply to ineffective assistance of counsel claims unless two conditions are met: (1) trial and appellate counsel differ; and (2) the ineffective assistance claim can be resolved upon the trial record alone. *English*, 146 F.3d at 1264. The procedural bar will apply only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied. *Id.* (citing to *Maes*, 46 F.3d at 986). According to the Tenth Circuit, Oklahoma has not developed an adequate mechanism in the direct appeal process for an evidentiary hearing on the ineffectiveness claim. *See English*, 146 F.3d at 1262. The *English*

court found that the procedural posture of the cases before it prevented it from determining whether the claims required supplementation of the record or additional fact-finding, and it remanded for such a determination. *Id.* at 1264.

In this matter, petitioner had no appellate counsel and there is no trial record. Given a clear indication from the *English* opinion that the Tenth Circuit does not deem Oklahoma's present remand procedure for ineffective assistance of counsel claims to be adequate, petitioner's claim must be addressed on the merits. Petitioner's claims require no supplementation of the record or additional fact-finding: petitioner disputes the law, not the application of the law to the facts, or the facts themselves.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. To prevail on an ineffective assistance of counsel claim, petitioner must show that his counsel's performance was deficient, and that the deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Osborn*, 997 F.2d at 1328. To show constitutionally deficient performance, petitioner must show that his attorney "committed serious errors in light of prevailing professional norms such that his legal representation fell below an objective standard of reasonableness." *Castro v. Ward*, 138 F.3d 810, 829 (10th Cir.)(quotations omitted), cert denied, __S.Ct.__, 1998 WL 635781 (Nov.2, 1998); *accord Moore v. Reynolds*, 153 F.3d 1086, 1096 (10th Cir. 1998). To show prejudice, he must demonstrate "a reasonable probability that the outcome would have been different had those errors not occurred." *Castro*, 138 F.3d at 829 (quotations omitted); *see also Moore*, 153 F.3d at 1096. The undersigned presumes that the conduct of petitioner's counsel falls within the range of reasonable professional assistance, and petitioner

must overcome the presumption. *Strickland*, 466 U.S. at 689; *Moore*, 153 F.3d at 1096. If petitioner fails to establish either the performance or prejudice prong of the *Strickland* test, the ineffective assistance claim fails. *Strickland*, 466 U.S. at 687.

Sentencing Errors

Petitioner fails to meet the performance prong of *Strickland* with regard to his claim that his counsel gave him "Erroneous Instructions as to the Maximum and Minimum range of punishment" for his crimes because those instructions were not erroneous. Petitioner first contends that his concurrent 30-year sentences violate the Fourteenth Amendment because the statute under which he was sentenced, Okla. Stat. tit. 21, § 1731 (1991), was repealed. (Dkt. #17, Ex. B, at 4-5.) Section 1731 of Okla. Stat. tit. 21 provided, in relevant part:

> 1. For the first conviction, in the event the value of the goods, edible meat or other corporeal property which has been taken does not exceed Fifty ($50.00) Dollars, punishment shall be imprisonment in the county jail not exceeding thirty (30) days, and by a fine not less than Ten Dollars ($10.00) nor more than One Hundred Dollars ($100.00); provided for the first conviction, in the event more than one item of goods, edible meat or other corporeal property has been taken, punishment shall be by imprisonment in the county jail not to exceed thirty (30) days, and a fine not less than Fifty Dollars ($50.00) nor more than One Hundred Dollars ($100.00).
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> 2. If it be shown, in the trial of a case in which the value of the goods, edible meat or other corporeal property does not exceed Fifty Dollars ($50.00), that the defendant has been once before convicted of the same offense, he shall, on his second conviction, be punished by confinement in the county jail for not less than thirty (30) days nor more than one (1) year, and by a fine not exceeding One Thousand Dollars ($1000.00).

Petitioner fails to mention that these two subsections were replaced with text that became effective July 1, 1998. The only change to these two provisions of the statute are the words "is less than" in place of "does not exceed" in front of the first reference to "Fifty ($50.00) Dollars" in each

subsection. The repeal of the statute had no effect whatsoever on petitioner's sentence and would not have substantively changed any advice counsel gave him as to the sentence he could receive.

It is undisputed that the value of the goods that petitioner stole exceeded $50.00. (See the attachments to petitioner's Motion to Proceed *in forma pauperis*, filed August 14, 1996, and to his Motion for Leave to Supplement/Amend, filed October 21, 1996.) Petitioner mistakenly believes that section 1731(2) mandates the range of punishment (confinement in the county jail) for a second conviction if the property *exceeds* $50. (Dkt. # 15, at 3.) However, both the former and the present versions of section 1731 provide, in any case where the value of the goods stolen is more than fifty dollars, the crime is considered a felony. (Compare former subsection 4 with current subsection 3.) Felonies, as petitioner accurately observes, are punishable by confinement in the penitentiary.

Relying on Okla. Stat. tit. 21, § 5 (1991)[12] and *State v. Young*, 203 P. 484 (Okla. Crim. App. 1922), petitioner nonetheless argues that the crime of which he was convicted was not a felony, but a misdemeanor, because the statutory punishment is imprisonment in the county jail, and not the penitentiary. He argues that, pursuant to Okla. Stat. tit. 21, § 51(A), enhancement of a sentence for repeat offenders is proper only for offenses punishable by imprisonment in the penitentiary, and not the county jail.

This issue was recently addressed by the Tenth Circuit in a case that is factually similar. On August 20, 1998, the Tenth Circuit decided an appeal from the Western District of Oklahoma in

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[12] Prior to July 1, 1998, Okla. Stat. tit. 21, § 5 provided: "A felony is a crime which is, or may be, punishable with death, or by imprisonment in the State penitentiary." The text effective subsequent to July 1, 1998 is as follows: "A felony is a crime which is, or may be, punishable with death, by imprisonment in the penitentiary with or without postimprisonment supervision, by a sentence to community punishment, or a fine."

which the petitioner challenged the legality of two sentences imposed by an Oklahoma state court. *Williams v. Klinger*, No. 98-CV-63-M, 1998 WL 537506 (10th Cir. Aug. 20, 1998). Williams, who had been convicted of two prior felonies, was sentenced to two concurrent terms of 40 years for his crimes of obtaining merchandise and/or money by a false and bogus check. As in this case, the petitioner maintained that the state court improperly enhanced his sentence pursuant to Okla. Stat. tit. 21, § 51 because the crimes of which he was convicted were punishable only by imprisonment in the county jail, and section 51 provides for enhancement only for crimes punishable by imprisonment in the state penitentiary. The Tenth Circuit rejected Williams' argument because Williams did not deny that he had two prior felony convictions before he pleaded guilty to the two felonies at issue on the appeal, and section 51(B)[13] requires only that the petitioner be convicted of prior felonies. *Williams*, 1998 WL 537506, at *1 (citing *Walker v. State*, 953 P.2d 354, 356 (Okla. Crim. App. 1998), in which the OCCA held that a prisoner's sentence had been improperly enhanced where he had only one prior qualifying conviction).

Petitioner in this matter does not deny that he has nine prior felony convictions, but he contends that, since the prior cases were consolidated for the purposes of sentencing, the court

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[13] Okla. Stat. tit. 21, § 51(B) (1991), provides, in pertinent part:

> Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years. Felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location.

should have considered the nine prior convictions as one prior conviction.[14] Under Okla. Stat. tit. 21, § 1731 (1991), the crime of which he was convicted does not become a felony until there are more than two violations of the statute. The record shows that petitioner's nine prior felony convictions (within the preceding 10 years) all occurred on the same day in 1985. Among the 1985 convictions are unlawful possession of controlled drug with intent to distribute, knowingly concealing stolen property, attempted burglary second degree, unauthorized use of a motor vehicle, burglary, attempted burglary, and burglary second degree A.C.F.C. (three counts). The trial court acknowledged that the nine former felony convictions were all pled together in a "'package' deal." (Dkt. #17, Ex. A, at 5.) However, the court reasoned that, since each was a separate crime in a separate case, not in the same criminal transaction, and generally not consecutively numbered, petitioner's allegations were without merit. *Id.*, at 6.

Oklahoma case law amply supports the decision of the trial court. The mere fact that convictions are entered on the same date and sentences are ordered to run concurrently does not mean that the cases are related within the meaning of subsection B of Okla. Stat. tit. 21, § 51, *Harris v. State,* 713 P.2d 601 (Okla. Crim. App. 1986), even where the prior convictions are numerically sequential, and guilty pleas are entered to both on the same date, *Love v. State*, 675 P.2d 466 (Okla.

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[14] In petitioner's brief supporting his first motion to amend, filed October 21, 1996, he maintained that the State improperly used his 1958 and 1964 convictions as well as his nine 1985 convictions in violation of Okla. Stat. tit. 21, § 51(A) (1991). (N.D. Okla. Dkt. #1; E.D. Okla. Dkt. #4). That section precludes the use of convictions more than ten years old to enhance a sentence. Petitioner did not make this argument in any subsequent motion to amend, or in his Amended Petition, and the undersigned declines to address it. Nine prior convictions more than satisfy the recidivist statute.

Crim. App. 1984); *see also Cooper v. State,* 806 P.2d 1136 (Okla. Crim. App. 1991); *Rackly v. State,* 814 P.2d 1048 (Okla. Crim. App. 1991); *Johnson v. State,* 764 P.2d 197 (Okla. Crim. App. 1988). Thirty years for conviction of larceny of merchandise from retailer after former conviction of two or more felonies is not excessive. *Mornes v. State*, 755 P.2d 91 (Okla. Crim. App. 1988). The OCCA has similarly upheld sentences of 30 years for larceny of domestic animals afer two former felonies, *Shulz v. State*, 715 P.2d 485 (Okla. Crim. App. 1986), and 31 ½ years for grand larceny after former conviction of two or more felonies. *Tinney v. State*, 712 P.2d 65 (Okla. Crim. App. 1985).

Petitioner also states that he was never before convicted of larceny of merchandise from a retailer. However, that fact is of no significance. Any prior felony counts. *See, e.g., Clonce v. State*, 588 P.2d 584 (Okla. Crim. App. 1978) (former convictions for conspiracy larceny of a bank and voluntary manslaughter); *Lee v. State*, 576 P.2d 770 (Okla. Crim. App.1978) (interstate transportation of stolen vehicle); *Porter v. State*, 666 P.2d 784 (Okla. Crim. App. 1986) (interstate transportation of a stolen vehicle).

Petitioner has not shown that the alleged instructions from his counsel as to the applicable sentencing laws were erroneous; thus, he has not shown that his counsel provided ineffective assistance. It follows that his ineffective assistance of counsel claim does not constitute cause for his failure to withdraw his guilty pleas or raise his sentencing issues on direct appeal. The issues he raises as to his sentencing are procedurally barred.

Incompetency (Revisited)

Although petitioner never expressly states that he failed to request a competency determination or raise his competency claim post-conviction due to the ineffective assistance of his

counsel, he does point out that the right to effective assistance of counsel depends on a defendants' competency to stand trial (quoting *Cooper*, 116 S.Ct. at1376), and the burden of proof to establish incompetency in Oklahoma before *Cooper* arguably violated the Sixth Amendment. (Dkt. #2, at 4-5.) However, petitioner fails to meet the performance or prejudice prong of *Strickland* with regard to any claim that his counsel provided ineffective assistance for failing to request a competency determination or challenge the constitutionality of the burden of proof required in Oklahoma to establish incompetency. Failure to seek a pre-trial competency evaluation, raise the issue of competency or even request a post-examination competency hearing does not constitute ineffective assistance of counsel absent any evidence raising a doubt as to petitioner's competency. *Castro v. Ward*, 138 F.3d at 830. As set forth above, the record is void of any evidence that petitioner was incompetent to stand trial or plead guilty.

Further, even if petitioner could have met the "more likely than not" standard of proving incompetency under Oklahoma's pre-*Cooper* law, his counsel's failure to anticipate a change in the law that was foreshadowed by existing precedent would not constitute ineffective assistance. *See, e.g., Brunson v. Higgins*, 708 F.2d 1353 (8th Cir. 1983); *Honeycutt v. Mahoney*, 698 F.2d 213 (4th Cir. 1983); *cf. Bousley v. United States*, __ U.S. __, 118 S.Ct. 1604, 1611 n.2 (1998). In *Engle v. Isaac*, 456 U.S. 108 (1982), the Supreme Court held that three habeas petitioners were procedurally barred from a constitutional challenge to jury instructions where the petitioners' claims were based upon a post-conviction change in Ohio's laws regarding the burden of proving self-defense. Justice O'Connor observed:

> We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is

> available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling unawareness of the objection as cause for a procedural default.

Id. at 134.

For the same reason, petitioner's counsel in this matter cannot be deemed ineffective for failing to anticipate the change in the law occasioned by *Cooper* or to raise the incompetency issue at all, given his understanding of Oklahoma law at the time. His counsel did not commit serious errors in light of prevailing professional norms such that his legal representation fell below an objective standard of reasonableness, and even if he did, petitioner has not demonstrated a reasonable probability that the outcome would have been different had those errors not occurred. Any claim that his counsel provided ineffective assistance for having failed to request a competency determination or challenge the constitutionality of the burden of proof required in Oklahoma to establish incompetency fails on the merits.

Factual Basis for Guilty Plea

As a final afterthought, petitioner asserts error by the trial judge in not establishing a factual basis for his guilty plea. (Petitioner's Answer to the Response to Petitioner for Writ of Habeas Corpus, Dkt. #18, at 3.) However, the lack of a factual basis for a state plea is not a federal constitutional claim, and absent any protest of innocence at the time a plea is entered, the trial court is not constitutionally required to establish a factual basis for the plea. *See Freeman v. Page*, 443 F.2d 493 (10th Cir. 1971). Petitioner is not in the same position as the defendant in *Baker v. Kaiser*, 929 F.2d 1495 (10th Cir. 1991) (denial of right to counsel at issue), as he alleges, but is in the position of the defendants in *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Laycock v. State of New Mexico*, 880 F.2d 1184 (10th Cir. 1989), who were unsuccessful in challenging the validity of their

guilty pleas on the ground of ineffective assistance of counsel. He has not shown that his plea was involuntary or "that there is a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 58.

Indeed, the transcript of petitioner's plea and sentencing proceedings indicates that the judge explained the charges, asked petitioner if petitioner was guilty and if petitioner committed the specific offense. Petitioner responded affirmatively to each question. (Dkt. #22, Tr. at 7-8.) Petitioner explicitly testified that he had two or more felony convictions in the State of Oklahoma, and that he understood the implications for sentencing of having two or more felony convictions on his record. (*Id.*, Tr. at 9.)

The Court: Now Mr. George, it's my understanding if you plead guilty here today in these matters you are going to the penitentiary.

Mr. George: Yes, sir.

The Court: Correct, for how long?

Mr. George: Pardon?

The Court: For how long?

Mr. George: Thirty years

* * *

The Court: Mr. George, it's my understanding at your sentencing, which is going to be in about 10 days on that day, that all three of these charges, three charges and two cases, you are going to receive a sentence to serve 30 years and those sentences are going to run concurrently. Now is that your understanding?

Mr. George: Yes, sir.

(*Id.*, Tr. at 9, 11.) Petitioner also stated that he was satisfied with the legal representation he received. (*Id.*, Tr. at 11.) The judge carefully explained petitioner's right to appeal and to withdraw

his plea of guilty, as well as the deadlines for each. (Tr. at 15.) Petitioner is thus bound by his "'solemn declarations in open court' and his unsubstantiated efforts to refute that record [are] not sufficient to require a hearing" so that a factual basis for his plea can be developed. *See Lasiter v. Thomas*, 89 F.3d 699, 703 (10th Cir.), *cert. denied,* 117 S.Ct. 493, 136 L.Ed.2d 386 (1996).

Evidentiary Hearing

In his Amended Petition, petitioner requested immediate relief, appointment of an attorney, oral argument, and vacation of the judgments upon which his convictions are based, or, in the alternative, an evidentiary hearing and a show cause examination. He also stated that he is not guilty of the crimes with which he was charged. (Dkt. #15.) However, in his answer to the response, he conceded that an evidentiary hearing is not necessary. (Dkt. #18.) The undersigned agrees. Unlike the petitioner in *Miller v. Champion*, No. 97-6439, 1998 WL 811780 (10th Cir. Nov. 24, 1998), petitioner in this case did not request an evidentiary hearing in state court, and he has not diligently sought to develop the factual basis underlying his habeas petition. *Id.* at *3. Under the AEDPA,

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
> (A) the claim relies on--
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Although petitioner failed to develop the factual basis of his claim in the State court proceedings, he has not established that either of the two exceptions set forth in § 2254(e)(2) apply. Thus, he is not entitled to an evidentiary hearing.

CONCLUSION

For the reasons set forth herein, the undersigned proposes findings that petitioner's sentencing claim is procedurally barred, and his incompetency and ineffective assistance of counsel claims are without merit. The undersigned recommends that petitioner's Amended Petition for Writ of Habeas Corpus be **DENIED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) and § 2254, Rules 8, 10. **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** *See Thomas V. Arn,* 474 U.S. 140 (1985); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

Dated this 3rd day of December, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 3rd Day of December, 1998.

L Schwebke

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VICTOR J. CUPPETILLI and
DALE A. CUPPETILLI

Plaintiffs,

vs.

MITCHELL COACH
MANUFACTURING CO., INC.
a Florida corporation,

Defendant.

No. 98-CV 761 H (J)

DISMISSAL WITHOUT PREJUDICE

Plaintiffs Victor J. Cuppetilli and Dale A. Cuppetilli, pursuant to Fed. R. Civ. Pro. 41(a)(1), dismiss their claims against Defendant Mitchell Coach Manufacturing Co., Inc. without prejudice to refiling.

Randall G. Vaughan, OBA #11554
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
100 West 5th Street
900 ONEOK Plaza
Tulsa, OK 74103
Phone (918) 581-5513
Facsimile (918) 581-5599
E-mail rgv@praywalker.com

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FRANCOISE WASS BOWE,

Plaintiff,

vs.

HUGHES LUMBER COMPANY, a Limited Partnership,

Defendant.

ENTERED ON DOCKET
DATE 12/2/98

No. 98 CV 0285 K(E)

FILED

DEC 01 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal With Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the Stipulation for Dismissal With Prejudice should be granted, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints and causes of action of any type by any party, should be and the same are hereby dismissed with prejudice.

IT IS SO ORDERED this 1 day of December, 1998.

TERRY C. KERN
United States District Judge

Jo Anne Deaton
P.O. Box 21100
Tulsa, OK 74121
1224-10

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GRACE J. BROWN,
SSN: 430-80-1883

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-786-J

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff nas been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 1st day of December 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(14)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GRACE J. BROWN,
SSN: 430-80-1883

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-786-J

ORDER[2/]

Plaintiff, Grace J. Brown, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to properly consider all of Plaintiff's impairments, (2) the ALJ's reasoning that Plaintiff can perform medium work but is limited by reaching and grasping does not make sense, (3) the ALJ did not properly evaluate Plaintiff's complaints of pain, and (4) the ALJ improperly failed to reopen

---

1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Administrative Law Judge Larry C. Marcy (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated March 22, 1996. [R. at 12]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 7, 1997. [R. at 3].

(13)

Plaintiff's prior application. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff reported that she did some light housework and sometimes drove her car. [R. at 76]. Plaintiff's daily activities include some light housework, reading, preparing dinner, and watching television. In addition, Plaintiff noted that she played bingo for approximately two to three hours two to three nights each week. [R. at 89-95]. Plaintiff noted that she shopped for groceries and clothes for approximately 45 minutes once or twice each week. [R. at 97]. In a disability report, Plaintiff noted that she experienced right and left wrist swelling and had difficulty using her hands. [R. at 81].

Plaintiff's treating physician, Steve Sanders, D.O., on April 7, 1995, noted that Plaintiff suffered from fibromyalgia, irritable bowel syndrome, and could not perform in an occupation "requiring extensive use of her hands or arms. I do not feel, however, that this eliminates her from performing any occupation." [R. at 110]. In addition, he wrote that "[w]e would expect that the patient would be unable to perform repetitive motion with the wrists, but again, I believe that she is qualified to resume other activities." [R. at 110].

At the hearing before the ALJ, Plaintiff testified that she could no longer work because her right hand swells. [R. at 214]. Plaintiff was born July 24, 1942, and at the time of the hearing Plaintiff was 53 years old. [R. at 213]. Plaintiff completed the eighth grade. [R. at 213].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

---

[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

5/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ noted that Plaintiff filed an application for benefits on January 3, 1994, which was denied February 1, 1994 and not further appealed. The Judge decided that no evidentiary basis existed to reopen the prior denial and therefore *res judicata* applied to the previous decision. The ALJ concluded that the beginning date of Plaintiff's current application was February 2, 1994, the day after Plaintiff's previous denial of benefits.

The ALJ concluded, based on the testimony of a vocational expert, that jobs existed in the national economy which Plaintiff could perform.

IV. REVIEW

THE ALJ FAILED TO CONSIDER ALL OF PLAINTIFF'S IMPAIRMENTS

Plaintiff asserts that the ALJ fails to consider Plaintiff's impairments "individually and in combination." Plaintiff's Brief at 1. Plaintiff asserts that she has significant limitations in her hands, wrists, and fingers. Plaintiff asserts that the ALJ ignores her reduced range of motion and her problems in both of her hands. Plaintiff additionally refers to records from various physicians indicating difficulty with her wrist, pain in her hand, a cyst on her wrist, and tenderness over her thumb. Plaintiff additionally asserts

that she has pain in her ankles, feet, legs, and hips, and that she suffers from irritable bowel syndrome and microscopic colitis.

Plaintiff testified, when asked why she was unable to work, that "every time I use this [right] hand it swells up." Plaintiff testified that she sometimes had headaches and nausea from the medications that she took. [R. at 217]. Plaintiff additionally mentioned arthritis and tendinitis in her left shoulder. [R. at 221].

Plaintiff's treating physician, on April 7, 1995, noted that Plaintiff could not perform in an occupation "requiring extensive use of her hands or arms. I do not feel, however, that this eliminates her from performing any occupation." [R. at 110]. In addition, he wrote that "[w]e would expect that the patient would be unable to perform repetitive motion with the wrists, but again, I believe that she is qualified to resume other activities." [R. at 110].

In an examination on November 17, 1993, the doctor noted that Plaintiff's left hand appeared completely normal. [R. at 173]. The doctor additionally noted that Plaintiff had not utilized the hot paraffin baths as prescribed because Plaintiff stated she was unable to find paraffin. [R. at 172].

An examination on March 3, 1995, revealed "no evidence of joint deformity, swelling, heat, tenderness or discoloration." [R. at 183]. The exam revealed a "slight limitation in the ulnar deviation of both wrists. [R. at 183]. In addition, "[t]oe walking and heel walking were normal." [R. at 184]. "The hand grip strength was normal for the left hand grip but the right hand grip strength was 4+." [R. at 184]. The examining physician noted a history of pain and swelling of her wrists, hypertension,

and obesity. The examiner concluded that "the findings seemed to show some evidence of discomfort and mild restriction in the range of motion involving her right wrist. There was no obvious evidence of swelling or acute inflammation of the wrist. On palpitation and squeezing of the right wrist she seemed to respond as if painful." [R. at 184].

Plaintiff states the ALJ ignored Plaintiff's additional limitations. Plaintiff refers to several places in the record where Plaintiff complained of ankle pain, wrist pain, or diarrhea. Plaintiff is correct that Plaintiff has been diagnosed with colitis, but Plaintiff does not specify any additional limitations based on this diagnosis, and Plaintiff's treating physician did not place additional limitations on Plaintiff. The ALJ concluded that Plaintiff could perform medium work limited by the use of the right hand and unable to perform repetitive fingering or grasping with the right hand.[6/] The ALJ's conclusions are supported by substantial evidence.

INABILITY TO GRASP/LIFT

Plaintiff states that the ALJ concluded Plaintiff was limited to grasping with her right hand only occasionally which was defined as from zero to one-third of the day. Plaintiff states that the ALJ therefore makes no sense stating that Plaintiff can lift 25 pounds if she cannot grasp.

6/ Plaintiff asserts that the ALJ erred because she has this limitation in both her left and right hands. The record contains some support, and Plaintiff testified, that her right hand is her limitation. Regardless, the Court notes that the questions to the vocational expert elicited testimony which provided jobs for an individual who could perform only "occasional" grasping or handling, but not repetitive work. [R. at 227]. The answer and the jobs listed by the vocational expert were not limited solely to Plaintiff's right arm/wrist.

Plaintiff's doctors concluded Plaintiff could not perform repetitive activities. Plaintiff did not have a restriction placed on her that she could not lift. The ALJ's restriction was on no repetitive fingering or grasping of her right hand. This restriction does not equate to an inability to lift.

ALJ'S EVALUATION OF PLAINTIFF'S PAIN

Plaintiff asserts that the ALJ paid only "lip service" to Luna and the medical evidence. Plaintiff notes that she has peptic ulcer disease, right knee pain and ankle pain, has tried splints, and is supposed to avoid non-steroid anti-inflammatory drugs.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

> [I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

> [T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In this case, the ALJ listed and discussed each of the above-mentioned factors. In addition, the ALJ noted the opinions of Plaintiff's treating physicians, the lack of medication for severe pain, the frequency of treatment, and Plaintiff's lack of

discomfort at the hearing. The ALJ concluded that Plaintiff was not disabled due to her complaints of pain. The ALJ's conclusions are supported by substantial evidence.

REOPENING OF PRIOR DECISION

Plaintiff asserts that the ALJ erred in failing to reopen her prior application. Plaintiff states only that good cause is not required. Defendant refers to Nelson v. Secretary of Health & Human Services, 927 F.2d 1109 (10th cir. 1990). The Tenth Circuit noted that absent a colorable constitutional claim a district court has no jurisdiction to review the Secretary's decision to decline to reopen a prior adjudication. Plaintiff does not present a colorable constitutional claim and does not address Nelson. The Court concludes that it lacks jurisdiction to review the decision of the Commissioner to decline to reopen the prior determination.

Accordingly, the Commissioner's decision is **AFFIRMED.**

Dated this 1 day of December 1998.

Sam A. Joyner
United States Magistrate Judge

DATE 12-1-98

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 30 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS L. STUESSY, and
AMERICAN FAMILY LIFE ASSURANCE
COMPANY OF COLUMBUS,

Defendants.

Civil No. 98CV0664K (J)

STIPULATION FOR DISMISSAL
AS TO DEFENDANT AMERICAN FAMILY
LIFE ASSURANCE COMPANY OF COLUMBUS

It is hereby stipulated and agreed that the complaint in the above-entitled case be dismissed with prejudice as to defendant American Family Life Assurance Company of Columbus ("AFLAC"), plaintiff and AFLAC to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

JAMES SOTTILE, IV
Caplin & Drysdale, Chartered
One Thomas Circle, N.W.
Suite 1100
Washington, D.C. 20005
(202) 862-8856

Counsel for Defendant
American Family Life Assurance
Company of Columbus

JEFFREY S. SWYERS, OBA # 16317
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044
(202) 514-6507

Counsel for Plaintiff
United States of America

mail

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing STIPULATION FOR DISMISSAL AS TO DEFENDANT AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 27th day of November 1998:

James Sottile, IV
Caplin & Drysdale, Chartered
One Thomas Circle, N.W.
Suite 1100
Washington, D.C. 20005

Thomas L. Stuessy, Pro Se
9413 S. 92nd Ave.
Tulsa, Oklahoma 74133

JEFFREY S. SWYERS, OBA # 16317
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6507

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED VAN LINES, INC., a corporation,

Plaintiff,

vs.

JON M. LOCKWOOD and ALICIA LOCKWOOD,

Defendants.

Case No.98 CV 0654B(M)

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United Van Lines, Inc. ("Plaintiff" or "United"), and files this Notice of Dismissal in the above styled cause pursuant to Rule 41 (a)(1) of the Federal Rules of Civil. In support of its Notice, United shows as follows:

1. The Complaint in the above styled cause was filed on August 27, 1998.

2. Service was made on the Defendants by certified mail on September 1, 1998.

3. The Defendants have failed to file an Answer.

4. The Parties have reached a settlement in this matter.

WHEREFORE, Plaintiff United Van Lines, Inc., files this Notice of Dismissal.

mail
C/S
enw kt

2

Respectfully submitted,

By: _____

DAVID B. SCHNEIDER, OBA #7969
RICHARD C. LABARTHE, OBA #11393
LAW OFFICES OF DAVID B. SCHNEIDER, P.C.
210 Park Avenue, Suite 1975
Oklahoma City, OK 73102
(405) 232-9990
(405) 232-9992 (Fax)
ATTORNEY FOR PLAINTIFF
UNITED VAN LINES, INC.

Certificate of Service

The above and foregoing was mailed by me, by first class mail, postage prepaid on the 25th day of November, 1998, to the following:

Jon M. Lockwood
5537 East 108th Street
Tulsa, OK 74137

And

Alicia Lockwood
5537 East 108th Street
Tulsa, OK 74137

_____
DAVID B. SCHNEIDER

DAVID B. SCHNEIDER
SCHNEIDER & LABARTHE, P.A.
Attorneys at Law
210 Park Avenue, Suite 1975
Oklahoma City, OK 73102

Tel ephone (405) 232-9990 **Fax (405) 232-9992**

November 25, 1998

Mr. Phil Lombardi
Court Clerk for the Northern District
333 W. 4th Street
Room 411
Tulsa, OK 74103

RE: United Van Lines v. Lockwood et al Case No. 98 CV 06564B(M)

Dear Mr. Lombardi:

Enclosed is an original and two copies of the Notice of Dismissal in the above-styled cause. Please send me a filed-stamped copy in the enclosed self-addressed stamped envelope.

If you have any question, please feel free to call.

Sincerely yours,

DAVID B. SCHNEIDER